

Six golden rules

In the first of a two-part practical guide to litigating cohabitation claims, Kate Allen and Ed Bennion-Pedley look at the key steps to take before issuing proceedings



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In the first part of this article we will highlight six golden rules to consider before the issue of proceedings. This is not a discussion of the law of cohabitation, but rather practical advice for those who do not routinely litigate under CPR 1998.

Assess the merits early

Whereas the courts adopt a fairly broad-brush approach to assess most family matters on principles of fairness, an application under s14 of the Trusts of Land and Trustees Act 1996 (TLATA 1996) must be carefully formulated according to established trust and property law. These claims can be expensive and an unsuccessful or discontinued claim is very likely to result in a costs order against the client. For that reason alone, it is crucial to gather and critically assess the evidence to establish whether the client has a legal rather than just a moral claim.

Clients must commit a sum to meet the initial cost of assessing the claim and understand from the outset that the case might not go anywhere. If the claim is strong, then thorough preparation may result in the claim settling earlier. If weak, then at least the client can be advised of that before they are exposed to the other side's costs, adding insult to injury.

Insist on seeing the documents

The conveyancing file is critical. Copies of attendance notes and correspondence may give a useful (or possibly calamitous) indication of what the parties' intentions were by detailing the advice given or the discussions held. More often than not, the conveyancing file will show that no one, including the conveyancer,

gave any thought at all as to how the property was to be held, which might in itself be useful.

If the client is a co-owner, they will be entitled to the file. If not, then the file will need to be disclosed by the other party or the other party will need to consent to its disclosure.

There is a duty to disclose the file, even if not in the possession of the other party, as the duty to disclose extends to documents in a party's control, which by CPR 31.8 includes documents for which that party has the right to possession or the right to inspect or take copies.

If in difficulty, there is also provision for an application for pre-action disclosure under CPR 13.16: applications for pre-action disclosure are useful because they allow a party to obtain documents necessary for the meaningful evaluation of their claim without the need to issue and so start the clock on costs. If the other party is represented, the threat of an application is often sufficient. If not represented, an application for pre-action disclosure can prompt that other party to get legal advice and so kick-start the pre-action process.

The test is set out at CPR 13.16. To succeed you need to show that:

- the applicant and respondent are likely parties in subsequent proceedings;
- the documents would be disclosable had litigation already commenced (essentially documents are disclosable if they adversely affect or support a party's case or if the party in whose control the documents are wishes to rely on them – CPR 31.6); and
- the disclosure would be desirable in order to:

- dispose fairly of the anticipated proceedings;
- help the dispute to be resolved without proceedings; or
- save costs.

The application is made by application notice N244, supported by evidence in accordance with the Practice Direction to CPR Part 23.

Part A of N244 should state that the application meets the appropriate test outlined above, and the evidence in support should be a brief witness statement setting out the history of the relationship, a brief outline of the grounds for the anticipated claim and the need for obtaining copies of the documents sought. The witness statement should also exhibit copies of correspondence sent in attempts to secure the disclosure to support the client's argument on costs, although the default position will be that the party seeking the disclosure will have to pay for the costs of the application. The solicitor rather than the client can make the witness statement if that is more convenient. The application should include a draft order.

This mechanism can also be used to obtain other documents, such as the other party's will file, Land Registry applications and mortgage files.

Where the client intends to rely on contribution, bank statements should be obtained and assessed. It is not unusual for clients to overstate their contribution only for the documents to fail to provide sufficient proof. If that is the case, it is essential to know in advance.

Look for an express declaration of trust

A claim under s14 TLATA 1996 is for declaratory relief of the parties' respective beneficial interests. It follows that the first question is whether the respective beneficial interests have already been declared.

Section 11 of the TR1 includes a declaration of trust. If that section has been completed and the TR1 executed by the purchasers, then that is generally the end of any enquiry into the parties' beneficial interest on acquisition. If not executed, it is evidence of the parties' intentions, but it is not conclusive.

In pre-1998 conveyances, declarations of trust were often overlooked. A declaration of trust

must declare the beneficial interest. Accordingly, declarations to the effect that the parties hold the proceeds of sale on trust for themselves, that they are beneficial joint tenants, or that they are joint tenants in equity will constitute declarations of trust. On the other hand, a declaration solely to the extent that either may give valid capital receipt on the death of the other will not (such a declaration being equally compatible with joint tenants holding on trust for a third party).

A declaration of trust speaks for itself and the court will have no discretion to declare other interests on acquisition unless and until the conveyance is set aside or rectified. This means that there is no room for a claim based on a

resulting, implied or constructive trust to reflect a different apportionment on acquisition unless the client argues mistake, fraud or perhaps undue influence or duress. This is difficult, and compelling evidence is needed.

The alternative is to argue for a post-acquisition change in beneficial ownership, but the authorities suggest that conduct alone is unlikely to be sufficient (see *James v Thomas* [2007]). To that extent, the case will be akin to those before *Stack v Dowden* [2007] and *Abbott v Abbott* [2007], and before the second limb of *Lloyds Bank v Rosset & anor* [1990] was relaxed. The evidence must be assessed accordingly.

Where there is no viable argument for a post-acquisition change in ownership there might still be an argument for the unequal distribution of sale proceeds. Unequal contributions to mortgage payments, capital improvements or occupation at the exclusion of the other may give rise to a personal liability against the non-paying co-owner that can be offset against the proceeds of sale to give the client a greater share. A detailed examination of the principles of equitable accounting falls outside the scope of this month's article, but may

affect expert evidence, which will be considered in the second part.

Finally, thought should also be given as to whether any mortgage debt attaches equally to the parties' respective interests, or whether through the doctrine of equity of exoneration one party's proceeds of sale should be reduced. This might be the case where one party has raised funds by way of a joint mortgage for their sole use.

Prepare a draft pleading

Even if the Part 8 procedure is to be used (to be considered in part two of this article), it is good practice to prepare a draft pleading at an early stage, as to do so will put into stark relief any weakness in the claim. This

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is particularly true when relying on a constructive trust or proprietary estoppel where detriment (or its corollary unconscionability) is an essential element. The draft pleading will also help to identify difficulties in the chronology (surprisingly, there are reported cases in which the alleged detriment has been suffered before the matters giving rise to the representation or inference of intention, with the result that no equity arises in the claimant's favour) and make it easier to draft witness statements and advise on evidence, as it will be clear from the outset what needs to be proved. It is also good practice to draft witness statements as part of this exercise, particularly where it is necessary to rely on evidence from others and there is a risk that allegiances may be 'fluid'.

Engage with the protocols practice direction

There is no formal pre-action protocol for cohabitation claims. Nonetheless, paragraph 4.1 of the protocols practice direction makes it clear, if such clarity is required, that parties should:

... act reasonably in exchanging information and documents relevant to

the claim and generally in trying to avoid the necessity for the start of proceedings.

There are potential costs consequences for failing to comply with the protocols practice direction.

Quite apart from that, a clear and compelling letter before claim sends a strong message to the other side and provides an opportunity for obtaining documents that may assist in assessing the claim and valuing it for the purposes of a Part 36 offer. Part 36 offers will be considered in part two of this article, but are essentially like old *Calderbank* offers. If litigation is required, it is likely to be 'cleaner', and consequently cheaper, if the parties have narrowed the issues.

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The basic structure is claimant's letter before claim, acknowledgment, then the defendant's response. The claimant's letter should:

- give details of what is claimed and the grounds for it;
- enclose documents in support;
- require a prompt acknowledgment followed by a full response within a specified period;
- reserve the right to issue if no response is received and, if the defendant is represented, ask for confirmation that the defendant's solicitors are instructed to accept service;
- request any documents needed;
- propose ADR if appropriate; and
- draw the defendant's attention to the court's powers to impose sanctions for non-compliance with the practice direction.

If the defendant is unrepresented, the letter should enclose a copy of the practice direction so that they know what is required of them. It is also important that the protocol letter should also state if a funding arrangement within the meaning of CPR 43.2(1)(k) is in place; in these circumstances such a funding arrangement is likely to be either

a conditional fee agreement with uplift or an insurance policy where premiums are recoverable by way of costs. Without that information, any additional costs liability will not be recoverable for the period up to when the information is finally given.

When responding, the defendant should either accept or deny the claim. If denied in whole or part, the defendant should:

- give detailed reasons why the claim is not accepted and particularly identify which of the claimant's contentions are accepted and which are in dispute;
- enclose documents in support;
- enclose documents the claimant has

requested or say why they are not enclosed;

- identify and ask for copies of documents that the defendant requires; and
- address ADR, if appropriate.

There may be a tendency by those in occupation or with weaker cases to try to delay proceedings by endlessly litigating the matter in correspondence. For that reason, pre-action communication should be focused with clear, but reasonable, deadlines. There are no prescribed time limits, but it is perhaps not unreasonable to expect the other side to serve an acknowledgment within 14 days and a substantive response 28 days after that.

By setting out the basis of the claim clearly, it is easier to press the defendant for clear admissions or denials on factual issues that will save time and money later.

Protect the client's position in the meantime

If the client is not a co-owner, then consider applying to the Land Registry for a restriction. In most cases, the claim is for a beneficial interest under a trust of land and so the application is by Form RX1 and the restriction requested in Form A, which states:

No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court. (Schedule 4 to the Land Registration Rules 2003)

The effect of this restriction is to prevent the disposition of the property, except where the disposition is made by a trust corporation, in which case the client's interest would attach to the capital money generated by the sale as a result of their interest being overreached. This is the same restriction as is entered upon the severing of a joint tenancy in equity.

This should only be done with reasonable cause (ie, the client must have an arguable claim). In the absence of reasonable cause, the client may be liable to a registered proprietor who suffers damage as a consequence (s77 Land Registration Act 2002). In the current market of falling house prices, it might be worthwhile to take a practical view on a potential sale by agreeing to cancel a restriction in return for a suitable solicitor's undertaking concerning the sale proceeds.

Where a sale of a property in sole ownership is imminent, there is the option of an injunction to prevent the sale or a freezing injunction in respect of the sale proceeds. In respect of the former, this is only likely to be successful in instances where it is the property itself that is important to the client, rather than the value of their alleged interest.

Life beyond the Family Proceedings Rules

Part two of this article, in *FLJ84*, will consider drafting and issuing proceedings, ADR, costs protection and case management. There will also be a precedent for family solicitors to give to their conveyancing partners in the hope of avoiding possible negligence claims. ■

Abbott v Abbott
[2007] UKPC 53
James v Thomas
[2007] EWCA Civ 1212
Lloyds Bank v Rosset & anor
[1990] 2 FLR 155
Stack v Dowden
[2007] UKHC 17