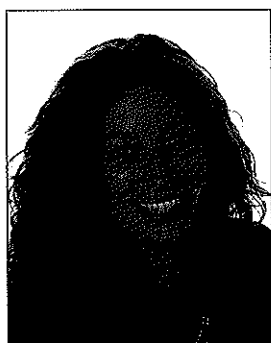


Life beyond the Family Proceedings Rules

Kate Allen and Ed Bennion-Pedley conclude their discussion of cohabitation litigation with a guide to TLATA 1996 claims under the CPR



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'There is a tendency to shy away from CPR Part 7 because the case must be pleaded. In our view, this is a mistake. If the case has been properly analysed and prepared pre-issue, then the pleading should flow naturally from that.'

In the first part of this article (FLJ83, p2), we suggested six golden rules to assist with preparing a cohabitation claim for those who do not routinely litigate under the CPR. This second part considers:

- issuing the claim;
- the procedure, including case management and ADR;
- costs protection;
- preparing for trial; and
- preventing a claim under the Trusts of Land and Trustees Act (TLATA) 1996, and avoiding negligence actions when advising on purchase.

Issuing the claim

There are two ways to begin a claim under the CPR: under Part 7 or Part 8. Technically, a claim for declaratory relief or an order for sale under s14 TLATA 1996 should be made using the Part 8 procedure. In reality, however, most claims are unsuited to Part 8, which is designed to determine issues of law rather than disputes of fact, and end up proceeding under Part 7 in any event.

Under Part 7, the claim is fully pleaded: the defendant pleads their defence and there is an option for the claimant to reply. Disclosure and evidence come later, following allocation and directions.

Under Part 8, the applicant sets out the relief claimed (rather than fully pleading the case) and serves their evidence with the claim form. The respondent has the opportunity

to contest the Part 8 jurisdiction and in most instances will do so, serving their response and evidence with their acknowledgment but without prejudice to their position on jurisdiction.

On the face of it, the joint tenant content with an equal share who simply wants the property sold would tend to favour issuing under Part 8, leaving the respondent to dispute jurisdiction and do the running by trying to rebut the presumption of equality in equity. In contrast, a non-proprietor claimant alleging a beneficial interest or a co-owner contending for a greater than equal share will tend to want to fully plead their case under Part 7, so as to put their case on the most favourable footing from the start.

However, there is a tendency to shy away from Part 7 because the case must be pleaded. In our view, this is a mistake. If the case has been properly analysed and prepared pre-issue, then the pleading should flow naturally from that. If a case is difficult to plead, it will tend to be difficult to win. Moreover, if the case is going to be fought then litigating under Part 7 from the start will be more efficient. For example, an initial hearing to determine jurisdiction and give directions to allow the case to proceed under Part 7 will be avoided, and witness evidence can be prepared in one go rather than in two or more statements, because the statements will be drafted after the parties have set out their respective cases and documents have been disclosed. Equally, Part 7 gives the claimant the opportunity to provide a substantive reply to the defendant's case at the outset,

thus clarifying the issues and not leaving a raft of allegations seemingly unanswered, as would normally be the case under Part 8. At trial, the judge will tend to read the pleadings first.

In instances where a party provides a vague pleading, CPR Part 18 provides a mechanism to request clarification or information reasonably necessary (and proportionate) for the understanding of the other side's case. The practice direction to Part 18 sets out the procedure, and in the absence of a satisfactory response you may apply under CPR 18.1 for an order requiring the other side to provide the information and the costs of the application. Part 18 is a very useful way to cut through unsubstantiated or unparticularised assertions. For example, a vague allegation of contribution can be met with a Part 18 request requiring the party to set out the sums paid and the source of those funds. Quite apart from the tactical benefit of drawing attention to weaknesses in the other party's case, it will make drafting witness evidence much easier.

Procedure

Once the pleadings are closed, the court will issue an allocation questionnaire. Cohabitation claims will inevitably be allocated to the multi-track, and the court will expect the parties to try to agree directions at this early stage.

If you are able to agree directions then it is possible to avoid incurring the costs of attending an allocation hearing. For this reason it is worth exploring directions with the other side and returning the agreed directions with the allocation

questionnaire. Standard fast-track directions (which can be equally well applied to multi-track cases) can be found in the appendix to the Part 28 practice direction. The court will require directions through to a case management conference (CMC) or pre-trial review (PTR).

Directions should therefore deal with:

- allocation;
- disclosure and inspection of documents;

remain in the property, the claim could be determined based on percentage share with a postponed order for sale and with liberty to apply in the event that valuation cannot be agreed.

If there is any possibility of the case settling before trial, then a convenient time to explore that, through mediation, is after the evidence has been exchanged. If there is to be a stay, then there must also be provision in the directions for the court to be informed of the result of that mediation, including the filing

It is worth exploring directions with the other side and returning the agreed directions with the allocation questionnaire.

- exchange of witness statements (usually simultaneously);
- expert evidence and questions to the expert;
- stay for mediation, if appropriate;
- listing for CMC and case summaries; and
- costs.

In the majority of cases expert evidence should be by single joint expert. It goes without saying that careful consideration should be given to whether valuation evidence is strictly required, particularly in the current climate when valuation evidence will have a limited shelf-life in any event. Even where one co-owner wishes to

of a consent order. Mediation can be by way of a round-table meeting or a formal mediation appointment with an accredited mediator. If by way of a formal mediation appointment, it is usual for each party to be represented by their solicitor or barrister. There are potential costs consequences for a party who unreasonably declines ADR if it is proposed by the other party.

If the case is not settled then the case management conference will deal with any outstanding matters, time estimates and listing for trial. The court will expect a short, agreed case summary outlining the issues, numbers of witnesses and any other factors that will affect the trial or preparations for it, such as any further directions needed.

Once the matter is listed for trial or allocated a trial window, the court may wish to list a PTR. If it does, it is worth trying to include provision for the filing

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of a joint certificate of trial-readiness, allowing the PTR to be vacated.

Although the parties are allowed to informally vary the directions between themselves to take account of slippage or unforeseen delays, the court must approve any change in the timetable affecting a CMC, PTR, the return of pre-trial checklists, the trial, or the time estimate for trial (CPR 29.5). Any request for approval must be made by application notice on Form N244 in the usual way.

Costs protection

You can rely on 'without prejudice save as to costs' offers in support of a costs

offer will have to pay the claimant's costs to the date provided for acceptance of the offer, which might make a formal Part 36 unattractive.

Preparing for trial

At the CMC the court will give directions for trial, including a direction for filing a pre-trial checklist at least eight weeks before the start of the trial window. It is the return of the pre-trial checklist that triggers the court to give a firm date for trial, if that has not already been done (CPR 29.6).

Solicitors are also required to file a (further) costs estimate with the pre-trial checklist. The estimate

- Part 18 requests and responses;
- directions;
- witness evidence;
- expert evidence;
- (necessary) documents; and
- (relevant) correspondence.

If the bundle is likely to be cumbersome it is not unusual to have separate bundles for expert and/or witness evidence. Bundles must be filed not more than seven nor less than three days before trial and the contents should be agreed. Where it is not possible to agree the contents, a summary of the points on which the parties are unable to agree should be included.

Avoiding negligence actions

It is a recurring theme in cohabitation cases that most if not all disputes could be avoided if the purchasers were properly advised on purchase. We are aware of only one reported case in which a claimant tried (unsuccessfully) to sue his solicitor for failing to adequately advise on matters of ownership, but that is sure to change. Cohabitation claims have become more difficult after *Stack v Dowden* [2007], and the option of suing for loss of the chance of establishing a proper basis of ownership has become more attractive.

For that reason alone it is worth checking that your conveyancing department provides clients with adequate written advice and the option of taking separate advice where necessary. In our experience, most advice letters concerning joint tenancies focus on survivorship rather than the presumption of equality on severance either by unilateral or joint notice or the operation of law on bankruptcy.

Too often purchasers think they are being asked whether they want the property to pass to the other on their death, rather than the more fundamental question of who is to own what. Purchasers should be left in no doubt that unless they declare

Care should be taken over the costs estimate, as these are routinely referred to on detailed assessment. A disparity of more than 20% between estimated and actual costs calls for an explanation.

argument in the usual way, but CPR Part 36 contains formal provisions for making offers that have more stringent costs consequences.

Beating a Part-36-compliant offer tends to result in a claimant offer or being awarded post-offer costs on an indemnity basis plus interest on those costs. But equally, a successful claimant could end up paying the defendant's costs if they fail to beat the defendant's offer. Part 36 offers, like the much-missed *Calderbank* letters, are powerful tactical weapons, so it is wise to make any offer as early as possible. There is a prescribed form (N242A), but a Part 36 offer can be made equally well in correspondence as long as the elements of the offer comply with the requirements set out in Part 36 and the practice direction. It is worth remembering that:

- the adverse costs consequences that follow beating a Part 36 offer are triggered at the end of the period during which the offer can be accepted (21 days, after which the offer can only be accepted by consent or with the permission of the court); and
- a defendant making a Part 36

should be substantially in the form illustrated in cost precedent H, annexed to the practice directions to Parts 43 and 48 (an example estimate is available at www.justice.gov.uk), but this requirement does not seem to be rigorously enforced as long as costs incurred to date are clearly differentiated from anticipated trial costs.

Care should be taken over the costs estimate, as these are routinely referred to on detailed assessment. A disparity of more than 20% between estimated and actual costs calls for an explanation. In the absence of an adequate explanation, the court may regard the difference between the costs claimed and the costs shown in the estimate as evidence that the costs claimed are unreasonable or disproportionate.

The court will have given a direction for the filing of bundles. For details of the format and content of trial bundles see the practice direction to CPR Part 39. The standard format is:

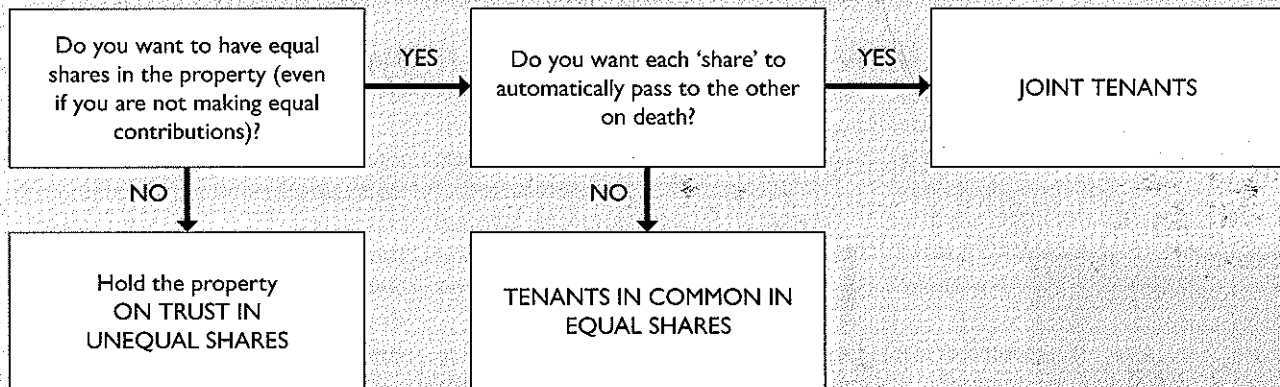
- case summary;
- pleadings;

Oxley v Hiscock [2004] EWCA Civ 546
Stack v Dowden [2007] WTLR 1053

Advice for joint purchasers

As joint purchasers you have a choice as to how you will hold the property you are buying and you must consider your options very carefully. The purpose of this chart is to help you decide which option is the right one for you, but it is no substitute for advice and you should discuss the options with me. I will need joint instructions from you. If you cannot agree which option is best for you, you need to take separate independent legal advice.

The principle question you need to decide is whether your respective shares in the property are to be of equal value.



ON TRUST IN UNEQUAL SHARES

Distinguishing feature: you will declare at the outset your respective interests in the property.

This route is the only viable route for those wishing to have unequal shares in the property. This might be appropriate where:

- one purchaser has contributed more to the purchase price or intends to make greater contributions to the mortgage;
- where one purchaser anticipates an inheritance that will be used to pay off part or all of the mortgage; or
- where one purchaser may make a further capital investment in the property, such as paying for renovations or improvements;

This firm can draft a trust that can take into account anticipated future expenditure, but it is important to review the trust deed regularly to ensure that it accurately reflects your wishes. I may need to advise you to take separate independent legal advice on the trust (and any subsequent variation) before it is executed.

TENANTS IN COMMON IN EQUAL SHARES

Distinguishing feature: each of you will own half of the property and can dispose of that share as you wish.

This might be appropriate where:

- joint purchasers are not married or civil partners;
- where joint purchasers are married or civil partners but have children from a previous marriage to whom they wish to leave their share by will;
- where family has assisted in the purchase and the purchaser would wish that contribution to be returned to their family in the event of their death;
- where there is likely to be a significant inheritance tax liability and the ability to equalise assets may assist in mitigating that liability; or
- where the property forms part of a business partnership.

If this option is chosen it is essential to have a valid and up-to-date will.

JOINT TENANTS

Distinguishing feature: no shares as such, and you will own the whole property together. Because there are no distinct shares, there is nothing to leave in a will. If one of you dies, the other as the surviving joint tenant will own the whole property ('right of survivorship').

It is possible to 'sever' a joint tenancy later.

This might happen by choice (for example on separation or to assist with inheritance tax planning) or through operation of law, for example if one of you becomes bankrupt. In such instances, you would then hold the property as tenants in common in equal shares.

It will be very difficult to argue later that you intended to have unequal shares in the property if you choose this route.

This route might be appropriate where:

- joint purchasers are married or civil partners who want true community of property.

their unequal ownership at the outset it will be difficult to contend for unequal shares if things go wrong.

The advice flowchart above may be enclosed with or form part of the letter of advice sent when advising joint purchasers, but conveyancers

should also be alert to instances where, although the property is to be held in one party's sole name, it is effectively a joint acquisition (see for example *Oxley v Hiscock* [2004], in which Chadwick LJ noted with approval the steps taken by the parties'

solicitor at the time to establish the source of the purchase money and to protect Mrs Oxley's position). If appropriate, the contributing non-owner should be advised to protect their interest by registering an appropriate restriction at the