House rules

James Carroll presents a guide for the family practitioner engaged in property litigation

James Carroll is a partner at Russell-Cooke Solicitors LLP

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The Office for National Statistics has estimated that 10% of the adult population is in a cohabiting relationship, and that this number will continue to rise. This is but one statistic showing that the concept of the family is morphing. The modern family lawyer must therefore be equipped to represent the modern family. Applying the above statistic, if one restricts one's practice to being just a 'divorce lawyer' then one potentially excludes representing a considerable part of the population. Yet it is not just those in a cohabiting relationship that own property together. Co-ownership arises in a variety of situations: friends purchasing together, the extended family buying a property, buy-to-let investments, etc.

Given the above, it is unsurprising that a family lawyer's time is increasingly occupied by disputes surrounding property ownership outside marriage or civil partnership. As it stands (and so it seems likely to remain for the foreseeable future, despite efforts for reform) such disputes must be resolved under the Trusts of Land and Appointment of Trustees Act (TLATA) 1996. Even if a family practitioner is relatively familiar with TLATA 1996 itself, when it comes to the procedure to be applied, they can often find themselves in unknown waters. Abandoned are the Family Proceedings Rules 1991, and the much-thumbed 'Red Book', and out come the Civil Procedure Rules (CPR) 1998 and the little-used 'White Book'. The rules themselves are available online at www.justice.gov.uk/civil/procrules_fin, thereby ensuring that you are working from the latest version.

Anecdotally, family lawyers often avoid dealing with such rules, given that the vast majority of these disputes settle before proceedings are issued. That said, and as will be seen, conducting a case without a clear understanding of the rules in the hope that it will settle is incredibly risky. Several months down the line if compromise is not forthcoming practitioners may find themselves wishing that they did things differently from the outset. Accordingly, these hints and tips commence with receiving initial instructions.

First meeting

It is probably trite to say that caution should be taken about accepting instructions unless there is at least some familiarity or experience with the area. The CPR 1998 often set out a procedure that is the complete opposite to that used in traditional family proceedings. The client has a right to know the potential effects of this at the outset. Although it may not always be possible to provide an absolute indication of the outcome of the proceedings at the first meeting, there is often enough information to express a provisional view. To do this one must be familiar with the effects of whether a property is owned as a sole owner, joint tenants or tenants in common. Further, one must be familiar with the effects and interpretation of declarations of trust and, without such express trusts, how a resulting and constructive trust may arise and how the doctrine of proprietary estoppel operates. Further, advice must be given on the procedure, timescales and likely costs. In relation to the latter, the client must be forewarned at the outset of the effects of the costs rules in such proceedings (see below).

Initial evidence gathering

It is of the utmost importance, when first instructed, that if possible the conveyancing file is obtained. The file may well include the transfer deed. Before 1 April 1998 this was in Form 19 (JP), which did not allow transferees to state their beneficial interests as well as their legal title. The TR1, the Land Registry form in use since 1 April 1988, provides a box for the transferees to declare whether they are to hold the property on trust for themselves as joint tenants, on trust for themselves as tenants in common in equal shares, or on other trusts which are inserted on the form. If this part of the form is properly completed it will amount to a clear declaration of the shares of co-ownership. It is not just the TR1 that will be of interest: the correspondence, files notes, etc may contain useful information. This is contemporaneous evidence and is likely to be significant. As an aside, it is recommended to request and examine the entire file. Conveyancers are under considerable costs pressure and an important note may be scribbled on the side of the file or the back of a document. Do not rely on what the client provides to you or tells you.

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A useful tool at this stage and before issue is pre-action disclosure, whereby disclosure can be requested on a voluntary basis.

Importance of cost estimates

Be careful that an estimate of costs given at the outset does not later come back to cause problems. The estimate must be realistic. In due course in any proceedings, and particularly at allocation and listing stages, a schedule of costs must be filed with

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Rather than risk a later conflict (or allegation of conflict) it is preferable to advise that fully independent solicitors be instructed.

Part 36 offers and settlement

It is rare that a client wants to litigate (particularly after they have heard your adequate costs estimate), and many will wish to resolve any dispute by a brief exchange of correspondence. Further, many family practitioners are appropriately resolution-focused and may be trained in, or at least inclined towards, mediation or collaborative law. Indeed, if mediation isn't considered then a court may later stay any proceedings for mediation to take place. Alternatively, a refusal by one party to attend mediation can later have costs consequences.

Focus on settlement may well be in the client's best interest. The effects of not reaching settlement must also be considered. Most importantly, remember (and ensure the client knows) that the effects of making or rejecting an offer can be considerable. Although obviously more complex than this, the basic CPR costs rule is that the 'loser' pays the costs of the 'winner'. This presumption that a costs order will 'follow the event' does not of course apply to ancillary relief proceedings, where the presumption is that there will be no order for costs, whatever the outcome. Following *Baker v Rowe* [2009] it is clear that costs will follow the event in any claim under the Trusts of Land and Appointment of Trustee Acts 1996, even when this is not free-standing but determined as a discrete issue in ancillary relief proceedings by the joinder of an intervener.

Therefore, making a good offer at the outset (and before substantial costs are incurred) or rejecting a reasonable offer and later revisiting this (or more worryingly, failing to beat the offer at trial) can have a major impact. If a CPR Part 36 offer is accepted after a 21-day period then there must be agreement or determination of the paying party's liability for costs, and the accepting party may also have some liability for costs. The importance of this consideration is heightened if the dispute involves a property with comparatively little equity. A reasonable early formal offer can be even more crucial in a lower-value case where there is concern about the proportionality of costs.

To take advantage of these principles, and the ability to claim interest on any offer, the offer needs to be appropriately formatted. The protection is afforded to CPR Part 36 offers, and the offer should be phrased as such and be compliant with the relevant rules (made in writing, marked as a Part 36 offer, specify a period of not less than 21 days for acceptance, etc). Part 36 offers are without prejudice. That said, the offer should not be simply marked as such (unless that is what is explicitly intended) but rather as a Part 36 offer. Lawyers should be wary of including a 'no order for costs' provision unless carefully drafted, as this could undermine the cost-protection element of Part 36 offers. Further, consideration should be given to confirming any offer made in mediation in a formal Part 36 letter, failing which reference cannot be made to or later reliance placed on any such offer.

Discussion here is focused on offers made at the outset. The principles discussed also apply to offers made throughout a case. Given the 21-day period in which the offer can be accepted, the importance of timing is crucial. If an expensive stage in the proceedings is approaching (or, more so, a trial), work backwards so the 21-day period expires before these costs are incurred. It is essential to withdraw an offer if circumstances change and you no longer want the other party to be able to accept it. Before you do so, however, consider the costs consequences, as this may cause your client to lose the cost-protection afforded by the offer.

the court and served on the other parties. These estimates can have important consequences for the conclusion of the case and for assessing what costs can be recovered in the event of a successful outcome. In particular, paragraph 6.5A(1) of the CPR practice direction about costs (CPR Parts 43-48) states that on a detailed assessment if there is a difference of 20% or more between the receiving party's cost estimate and final bill of costs, they must justify this discrepancy. Therefore, if the estimate is inaccurate and too low, the paying party is likely to rely on the costs shown in the estimate to dispute the reasonableness or proportionality of the actual costs. This has two effects: first, your client will not thank you if the estimate you provide at the outset is wildly different from that you later file in court, and second, they will thank you even less if the formal court costs estimates inhibit their chances of recovering a greater proportion of their costs.

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Instruction of counsel

There is considerable advantage to the early gathering of evidence, including taking a full proof of evidence from your client, and making an early offer. Therefore, consider instructing suitably experienced counsel at the outset. This will help formulate the case strategy, in particular if there is to be litigation. Although it may be helpful to have a family-friendly barrister, practitioners must ensure that they instruct someone who is familiar with property disputes and general civil litigation. This may or may not be the case with your usual barrister, or even your usual set.

Initiating a claim

Most commonly, disputes about property are initiated using the Part 7 procedure (the difference between Part 7 and Part 8 is whether there is likely to be a substantial dispute of fact). A Part 7 claim is accompanied or followed by particulars of claim. The costs of initiating proceedings can therefore be substantial (particularly when compared to issuing a Form A

application under the Matrimonial Causes Act 1973). Badly drafted particulars of claim or statements in them that are later proved to be false are likely to cause considerable problems later in the proceedings. This is another reason why the evidence should be gathered and counsel instructed as early as possible.

If you are served with particulars of claim, it is important to act promptly, and file an acknowledgment of service indicating an intention to defend (all or part of) the claim and afterwards file a defence. Strict time limits for this are set out in Part 15. The consequences of not acting promptly can be serious, and judgment in default can be obtained by the claimant without the filing of a defence (necessitating an application to set aside judgment and justifying the failure to file in accordance with the CPR; this not only has cost consequences but is not a strong footing from which to commence the litigation).

Practitioners can use the mechanism provided under Part 18 if they receive an inadequate or incomplete claim or defence. This provides for clarification of a statement or the provision of further information, whether initially by voluntary request and reply or, failing a reply, by application and (if successful) an order. If the claim or defence is wholly without merit then a procedure under Part 24 can be used to apply to the court for summary judgment.

Progress to trial

Although not always the case, the first hearing usually takes place after pleadings have closed (including any counterclaim and reply). At this point the allocation questionnaire (and costs estimate) must be filed. Directions are then given at the case management conference for the future progression of the case. The directions are of fundamental importance and will regulate the filing of expert evidence, including valuation evidence, under Part 35 (which family practitioners should be familiar with). Effort should be made to agree these directions so far as is possible, and where all directions are agreed the court may be willing to order such by paper application, without the need for a hearing (hence saving considerable costs).

The directions will inevitably include provision for the disclosure of evidence and the filing of witness statements. The timetable, although reasonable, may be quite tight. However, if the case has been actively managed from the outset then the disclosure and information required should already be (at least in part) in hand. It is vital that the client is aware of their disclosure obligations, including how far they must search for documents, that they should obtain documents in their control even if they do not currently have copies, and that the obligation is ongoing. These obligations are set out in Part 31 and should be confirmed to the client in writing.

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The client must appreciate that they are required to disclose all relevant documents. This includes those documents that are adverse to their case. If a party thinks that the other's disclosure is inadequate and that specific documents are missing then Rule 31 allows an application to be made to the court for an order for specific disclosure seeking such documents. In addition, much can be made by experienced counsel in cross-examination if relevant adverse documents are not disclosed voluntarily.

Confusion often arises over disclosure and inspection. It is important to remember that under Rule 31 standard disclosure is informing the other party that a document exists or has existed. This is done simply by providing a list of documents. The party to whom a document has been disclosed then has a right to inspect or obtain copies of the documents. The documents are not sent with the list of documents, and not every document has to be inspected or copied unless requested (however, it is often useful to request a copy of everything and agree to pay the copying charges).

Drafting the witness statements should be relatively straightforward (albeit potentially time-consuming), given that the 'story' should be fully proofed at the outset, the strengths and weaknesses considered in conference, the pleadings carefully drafted, and the disclosure completed.

A handy tactic (which can be employed no later than 21 days before trial) that can either narrow the issues in dispute or cause concern for the opposing party is the service of a notice to admit facts. These are governed by Rule 31.18. Such a notice asks the receiving party to admit that a particular fact is true. The request can be carefully structured to be particularly awkward (it is the formal process of asking a question that you already know the answer to). The receiving party does not have to admit the fact, and can simply refuse to respond to the request. However, there can be costs consequences of doing so, particularly where time is spent proving such facts at trial.

Conclusion

The above analysis provides a few examples of potential pitfalls and highlights some useful tactics in property litigation. There is no substitute for reading the CPR themselves (they are quite accessible), but I hope this article will place you on a firmer footing leading up to a pre-trial review and ultimately any trial itself. ■

Baker v Rowe
[2009] EWCA Civ 1162