Intervener actions in financial remedies proceedings: interests in land – a brief guide

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Luke is a financial remedies and TOLATA specialist. Luke is approachable, calm, confident and able to put his clients at ease: utilising the skills he acquired in his previous life in the entertainment industry. He offers a sensible, pragmatic and persuasive approach to the matters in which he is instructed.

The consequent reduction in equity brought about by a successful third-party claim is often significant enough to cause a demonstrable drop in housing capital post-separation. It is no wonder that intervener actions in financial remedy proceedings can be so hotly contested.

Bringing or opposing an intervener action is not for the faint of heart. Both lay and professional parties must have their wits about them in order to successfully chart the minefield that is the establishment (or defeat) of third-party interests in land. Intervener actions are clean sheet cases (*Baker v Rowe* [2009] EWCA Civ 1162) and thus the stakes are high, especially in modest-to-low asset cases.

This article will address the following questions:

(1) How to identify that a case is suitable for joinder.

(2) What is the correct procedure for joinder?

(3) What is the applicable law for dealing with third party interests?

(4) How best to run a joinder case.

Is your case suitable for joinder?

The advantages of joinder were set out in the oft-cited (for different reasons) *Tchenguiz-Imerman v Imerman (Application for Joinder)* [2012] EWHC 4277 (Fam), [2014] 1 FLR 865:

(1) it assists the court in establishing and determining all relevant issues in dispute;

(2) it subjects the joined party to the disclosure obligations brought about by party-status;

(3) potentially most importantly, any order made affecting the disputed property is binding upon them.

Actual joinder must be obtained, for a mere invitation to intervene does not, by itself, produce an order that binds the third party if that invitation is not taken up (*Gourisaria v Gourisaria* [2010] EWCA Civ 1019, [2011] 1 FLR 262).

Deft client interviewing skills are essential to identify the issues early. Within the first (or second, at maximum) meeting, the assets of the marriage and how they are held should be determined. The practitioner should ascertain the following:

- Whose name is on the title/s:
  - obtain official copy entries from the Land Registry;
  - obtain the TR1 transfer document – this is especially useful, depending on which side of a case you are on, if it contains an express declaration of trust (see below).
- Whether any third parties contributed to the purchase of the property.

- Whether any third parties provided loans/gifts to the parties during the relationship which may be argued/interpreted as granting them a beneficial interest (more on the test later).
- Whether the parties own one or more commercial/buy-to-let properties with business partners. If so, whether they have formally identified their respective interests in the properties.
- Whether there is any written evidence (text messages, emails, cohabitation agreements, love letters, etc) discussing the parties' interests in the property.

If any of these enquiries results in the conclusion that third party interests will be an issue in the case, it is essential to commit early to the joinder process. This does not mean running headlong into a poor case with consequent costs risks, however. It means carefully assessing the nature of the case, the proportionality of running the issue and beginning to consider the correct procedure.

What is the test?

According to FPR 2010, r 9.26B(1), the court may direct that a person or body be added as a party to proceedings for a financial remedy if:

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

When is joining a party 'desirable'?

The *Welsh Ministers v Price and Another* [2017] EWCA Civ 2301 case outlined the dual lodestars of desirability: (1) the policy objective of enabling parties to be heard if their rights are affected; and (2) the overriding objective (dealing with cases justly, having regard to any welfare issues involved).

Plainly, if there is a dispute over a divorcing spouse's beneficial interest in a property, in all but the most exceptional of cases, the test for joinder will be easily met.

So, once it is established that joinder is required, what is the procedure?

What is the procedure?

An application for joinder must be made in accordance with the Part 18 procedure and, unless the court directs otherwise, must be supported by evidence setting out the proposed new party's interest in or connection with the proceedings (r 9.26B(5)).

Of particular note is the oft-forgotten paragraph 4.6 of PD18A: every application should be made as soon as it becomes apparent that it is necessary or desirable to make it. This is echoed by the Mostyn J decision of *TL v ML and Others (Ancillary Relief: Claim Against Assets of Extended Family)* [2006] 1 FLR 1263 (approved by Thorpe LJ in *Goldstone v Goldstone* [2011] EWCA Civ 39, [2011] 1 FLR 1926), which helpfully sets out the directions to be sought:

(a) the third party should be joined to the proceedings at the earliest possible opportunity;

(b) directions should be given for the issue to be fully pleaded by points of claim and points of defence;

(c) separate witness statements should be directed in relation to the dispute; and

(d) the dispute should be directed to be heard separately as a preliminary issue, before the FDR.

In practice, it is possible to convince the court to 'roll up' a preliminary issue hearing at the start of a trial, but this is likely only possible in the event the third-party interest is not the sole issue in dispute or is of more ancillary importance. The court will not lightly order an FDR that is unlikely to be effective without the beneficial interest issue resolved.

Which party should seek joinder?

Once again, to the surprise of no financial remedy practitioner, Mostyn J provided the definitive guidance in *Fisher Meredith LLP v JH and PH (Financial Remedy: Appeal: Wasted Costs)* [2012] EWHC 408 (Fam), [2012] 2 FLR 536:

(a) if a claimant asserts that a property in the name of the third party actually belongs to the respondent, the claimant should make the application;

(b) if a respondent asserts property to which he holds legal title is owned by a third party, the respondent should make the application.

Of course, if a third party wishes to independently intervene, it is open to them to do so via Part 18 application, seeking *TL v ML* directions.

What is the applicable law?

The full extent of the law affecting the creation and disposition of interests in land is a topic large enough for its own book. This article will briefly touch upon the most commonly arising issues in financial remedy proceedings. Those are:

- express declarations of trust;
- common intention constructive trust;
- proprietary estoppel;
- resulting trust;
- rectification/rescission of a trust instrument.

This area of law is notoriously complex and looks to remain so for the foreseeable future in light of the government's recent refusal to consider reform. Nevertheless, each area can be boiled down to essential first principles. A short precis of each follows.

Express declaration of trust

Express declarations of trust are generally conclusive (*Goodman v Gallant* [1986] 1 FLR 513) it is impossible to argue the existence of a common intention constructive trust in place of an express declaration of trust as English law does not recognise the doctrine of the remedial constructive trust. Hence the importance of obtaining the TR1 or any other written documentation created at the time, though the instrument may still be challenged (if there are sufficient grounds) through rectification/rescission or superseded by a proprietary estoppel.

Common intention constructive trust

The most commonly occurring argument to establish or defeat a third-party interest in land is the common intention constructive trust; a species of implied trust that arises in very specific circumstances.

Generally speaking, equity follows the law (*Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858): the beneficial interest in the property will be assumed to reflect the legal title. Hence the importance of obtaining official copy entries.

A common intention constructive trust arises when the parties agree that the beneficial interests in the property shall reflect something other than the legal title. The burden of proof is on the party wishing to assert an interest that conflicts with the title. The claimant must prove that:

(1) there was a common intention;

(2) the claimant acted in reliance on that intention;

(3) the claimant suffered a detriment as a result of this reliance.

The most common way such issues arise is when one party asserts their parents provided deposit monies for the family home on the understanding that they would obtain a beneficial interest in the property. The other party inevitably argues this was intended as a gift and there were no discussions as to the beneficial interest.

Establishing a common intention can generally be split into two parts: (1) establishing an intention that the beneficial interest should not reflect the legal interest; and (2) establishing the shares in which the parties are to hold the property.

An interest in the property, whether held in the sole name of one party or the joint

names of the parties, is established objectively by reference to the whole course of dealing between the parties (*Oxley v Hiscox* [2004] 2 FLR 669). Express discussions are the most direct and effective evidence. However, it is often unusual for such discussions to be reduced into writing. Hence, the issue must often come down to evidence at trial, a risk that no self-respecting FR practitioner likes to take. Conduct, such as contributions to the mortgage capital repayments, contributions to renovations/repairs, or receipt of rental income from buy-to-let properties is capable of forming the basis of an inference as to intention. Each case will turn on its own facts.

When quantifying the extent of a beneficial interest, the court may impute what it considers fair in all the circumstances of the case, based upon the course of dealing between the parties (*Jones v Kernott* [2011] UKSC 53). It should be noted that the court should impute only if it lacks appropriate evidence to find an express or inferred intention to share the property otherwise than in accordance with the legal title.

Proprietary estoppel

The ingredients of proprietary estoppel are broadly similar to those of a common intention constructive trust. The difference is that proprietary estoppel is an equitable remedy which takes effect upon judgment of the court, whereas a common intention constructive trust is merely declared by the court to be the state of affairs subsisting at the relevant time. Hence, proprietary estoppel engenders more flexibility.

A claimant must prove the following:

(1) a sufficiently clear and unambiguous assurance by the interested party;

(2) reliance by the claimant on that assurance; and

(3) detriment suffered by the claimant in consequence of that reliance.

Resulting trust

The doctrine of the resulting trust has been largely removed from the domestic context (*Stack v Dowden*; *Jones v Kernott*), however, this may be relevant in cases where a spouse holds investment properties with third parties.

A resulting trust is said to arise where a party provides purchase monies for a property that is either vested in both parties' names or the recipient party's sole name. The law presumes that the monies were not provided as a gift and that they represent the purchase of a corresponding interest in the land.

It is for the respondent to rebut the presumption of a resulting trust. They may do so by relying upon the presumption of advancement or, more usually, an outright gift.

Rectification/rescission

The only way to defeat an express declaration of trust, aside from asserting a proprietary estoppel, is by rectifying or rescinding the trust deed itself.

These remedies are by far the most difficult to achieve. Rectification may only be relied upon where a vitiating factor such as fraud or undue influence is proven, both of which by their nature often necessitate progression to trial for evidence and thus rendering more difficult opportunities to settle out of court. Rescission may only be relied upon in cases of mistake, either mutual (which requires the claimant to meet a high evidential burden), or unilateral (which may only arise in exceptional circumstances).

By this point, it will be clear to the reader that asserting or challenging an interest in property requires a deft touch with the client and a clear insight into the relevant area of law. The stakes are raised by virtue of the clean sheet costs jurisdiction, the client is aggrieved that their matrimonial wealth is being abused and the law is complex. What can be done?

How best to run a joinder case?

It is essential to identify the issues early. By the end of the second interview, it should be

clear which property is in dispute, what the dispute is and who is said to have (or not have) an interest.

Once the landscape is clear (or, at least, less obscure), it is time to consider practicalities. If the title is not in your client's name, an early letter to the other side requesting the conveyancing file is essential. It is not unusual for a potential third party interest claim to fall away upon inspection of the objective documents.

Once a potential claim is established, it is never too early to think about directions for the first appointment. Most practitioners will be aware of the *TL v ML* directions, so it may be possible to agree directions up to the preliminary issue hearing.

Points of claim and points of defence should be treated as formally as particulars of claim and defence in civil proceedings. They must address each element of the legal principle applicable to the case, or else risk ending the claim before it has begun.

Conclusion

Any intervener action requires a watchful eye and a steady hand. Early identification of issues is essential to reducing costs risk and narrowing the dispute. Insightful interviewing and firm advice to clients are critical to avoid incurring significant costs on all sides, especially where costs follow the event.

Though complex, the principles affecting third party interests in land are well established and, generally, unmoving (see *Hudson v Hathway* [2022] EWCA Civ 1648 as a recent example of high appellate pushback against altering the orthodoxy). Much of the final decision may rest on the discretion of the judge hearing the matter, a situation with which all FR practitioners will be familiar.