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**Case update and NCDR options**

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# The ambit of this talk

1. A brief consideration of key recent cases
2. What to do before issuing court proceedings – NCDR options
3. What can happen if you do not engage in NCDR?

# Where to start?

A careful consideration of the conveyancing file should be the first port of call. The TR1 is a crucial document.

An express declaration of trust in TR1 or otherwise is conclusive unless set aside or rectified (**Pankhania v Chandegra [2012] EWCA 1438**). The bases for setting it aside are a subsequent agreement or proprietary estoppel.

# Background

- Stack v Dowden [2007] UKHL 17
- Jones v Kernott [2011] UKSC 53
- If no express agreement, look for common intention
- If the common intention changed over time, is it enough to prove the agreement, or do you need to prove detrimental reliance too?

## Hudson v Hathaway [2022] EWCA Civ 1648

- Parties' relationship commenced in 1990, they bought their home as joint tenants. They sold it in 2007 and bought another, also joint tenants.
- In 2009 separated. Mr. Hudson left
- In 2011 oil spill under the house which meant it was impossible to sell, insurance claim was protracted.
- 2012 – 2013 the parties engaged in email correspondence to settle their finances. They agreed that he would keep his shares and pensions, and she would keep the house and the savings.



- Mr. Hudson's email said:  
*“Which leaves the house, a bad asset which is preventing all of us [from] .. moving on with our lives.... You know what, I want none of the proceeds of that either. Take it. ”*
- *The email was signed “Lee”*



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- Ms. Hathaway agreed in an email.
- Thereafter he stopped paying the mortgage and she took the payments over. She made no claim against his other assets
- The house remained unsold because of the ongoing insurance claim
- In 2019 Mr Hudson applied for an order for sale and an equal division of the proceeds

# Hudson v Hathaway

- Was there a disposal of interest which complied with the requirements of Law of Property Act 1925 S.53(1) (a) and (c) (in writing and signed)?
- Yes – emails are “writing” and a name at the end of them is a “signature”

# Hudson v Hathaway

- If there was a change to the original common intention, was it enough to prove that change, or was detrimental reliance required?
- In order to prove a new constructive interest trust there has to be evidence of both: the change and the detriment.
- In this case, Ms. Hathaway taking over 100% of the mortgage payments, not seeking child maintenance and not making any other claims against Mr. Hudson were accepted as being sufficient detriment (even though she had no claims to make).

# Detriment

- Detriment is an essential ingredient of all constructive trust cases.
- Guest v Guest [2022] UKSC 27 is the leading authority on what it means and how to prove it.

# Occupation rent

- Ali v Khatib [2022] EWCA Civ 481
- Davis v Jackson [2017] EWHC 698

The default position is that occupation rent will not be ordered unless there is a reason why it would be inequitable not to, e.g:

- one party has been excluded from occupation, or
- one party has used the occupation of the property for their own financial gain.

# Ali v Khatib [2022] EWCA Civ 481

*Something more has to be shown which makes it just and equitable that he should pay that other owner for his use and occupation of the property – for example, that he is exploiting the property for his own financial gain, or that he has precluded the co-owner from exercising a right of occupation that he (or she) wished to exercise. The focus should therefore be on the behaviour of the person in occupation.*

## **Nilsson & Anor v Cynberg [2024] EWHC 2164 (Ch)**

- A married couple owned their home as beneficial joint tenants, purchased in 2001
- In 2009 they separated, the Husband moved out
- They agreed informally that she would keep the house. She subsequently paid all of the outgoings and spent £10,000 on improvements. There were no financial remedy proceedings

# Nilsson v Cynberg

- In 2018 they initiated court proceedings, and the Husband was made bankrupt. The Trustee claimed the Husband's 50% share of the house.
- At first instance, the District Judge found that the parties had agreed that the Wife should be entitled to 100% of the house, and she had relied upon that to her detriment, so the Trustee was defeated. He appealed on the basis that the agreement was informal, vague and unwritten.
- On appeal the court determined that it had been open to the judge to find that there was a common intention constructive interest trust, and that the Wife had relied upon it to her detriment, and that consequently the Wife held 100% of the beneficial interest in the property

# Re Iqbal [2024] EWHC 49 Ch.

- The Husband owned a house in his sole name which the Wife moved into in 2000.
- In 2003 it was put into their joint names and a mortgage secured upon it. The Wife said the conveyancer was instructed to record her interest as 90% and the Husband's as 10% but in fact the TR1 showed them as tenants in common in equal shares.
- In 2016 they separated and the Wife said it was agreed (but not written down) that if she could keep the house and receive £5000 pcm she would make no claim against the Husband's other assets.
- In 2018 the Husband was made bankrupt by HMRC and sought to recover his half share of the house

- The court said the Wife needed to prove two separate common intention trusts: the first that they intended to hold the property 90/10 in 2003. The second that they agreed to hold it 100/0 in 2016.
- There was no written agreement and the Wife represented herself for much of the time. The court found her evidence to be vague and contradictory, and not capable of being an agreement that both the Husband and Wife shared. As a result she was unable to rebut the presumption that the beneficial title should follow the legal title and the court declared that the Husband's half share remained in tact.



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# Avoiding Litigation

## **Practice Direction on Pre-Action Conduct and Protocols**

3. Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to—
- (a) understand each other's position;
  - (b) make decisions about how to proceed;
  - (c) try to settle the issues without proceedings;
  - (d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
  - (e) support the efficient management of those proceedings; and
  - (f) reduce the costs of resolving the dispute.

# Pre-Action Protocol

- Para 6:
  - a) the claimant writing to the defendant with concise details of the claim. The letter should include the basis on which the claim is made, a summary of the facts, what the claimant wants from the defendant, and if money, how the amount is calculated;
  - b) the defendant responding within a reasonable time – 14 days in a straight forward case and no more than 3 months in a very complex one. The reply should include confirmation as to whether the claim is accepted and, if it is not accepted, the reasons why, together with an explanation as to which facts and parts of the claim are disputed and whether the defendant is making a counterclaim as well as providing details of any counterclaim; and
  - c) the parties disclosing key documents relevant to the issues in dispute.

# Settlement and ADR/NCDR

**8.** Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.



**9.** Parties should continue to consider the possibility of reaching a settlement at all times, including after proceedings have been started. Part 36 offers may be made before proceedings are issued.

# Why not to issue (prematurely)

*16. The court will consider the effect of any non-compliance when deciding whether to impose any sanctions which may include—*

*(a) an order that the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;*

*(b) an order that the party at fault pay those costs on an indemnity basis;*

*(c) if the party at fault is a claimant who has been awarded a sum of money, an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise have been awarded;*

# Why not to issue (prematurely)

*(d) if the party at fault is a defendant, and the claimant has been awarded a sum of money, an order awarding interest on that sum for a specified period at a higher rate, (not exceeding 10% above base rate), than the rate which would otherwise have been awarded.*

- NB Unreasonably refusing or ignoring an offer to mediate is expressly included in the list of possibly non-compliant behaviour (see para. 14).

# **NCDR options:**

Arbitration

Mediation

Early Neutral Evaluation

# Arbitration Act 1996

The IFLA arbitration scheme enables arbitrators to deal with:

- a) Financial remedy proceedings
- b) Schedule 1 Children Act claims
- c) TOLATA
- d) Inheritance (Provision for Family and Dependants) Act 1975
- e) Financial remedies after a foreign divorce

There is a separate IFLA arbitration scheme to deal with child arrangements disputes which do not involve safeguarding concerns.

# A way to avoid mediation!

- By now mediations are the almost universally accepted way of jumping through the ADR hoop.
- However, not all cases are suitable for mediation. Sometimes an agreement is never going to be reached. A decision has to be imposed.
- In those cases, suggest arbitration. It is a recognised form of ADR and so complies with your obligation to try and avoid litigation, but it has the same degree of finality as litigation.

Arbitration can only happen with the consent of the parties. That consent, and the basic procedural framework which is to be adopted, is contained in Form ARB1FS. By signing this form the parties:

- a) bind themselves to the process
- b) Choose the Arbitrator (or the mechanism for choosing them)
- c) Outline the scope of the dispute - IMPORTANT
- d) Agree to conduct the arbitration in accordance with the IFLA rules
- e) Agree not to start, or to stay, any court proceedings
- f) Agree to convert the arbitral award into a court order
- g) Choose which costs principles will apply

# IFLA Rules (7<sup>th</sup> ed, 2021)

17 Articles. Of note are:

- Art 4.6 a party may be represented by a lawyer or “other person chosen by him”. However, by Art 4.7 the Arbitrator can exclude any such person who “unreasonably impedes or is likely to impede the conduct of the arbitral proceedings”
- Art 7.2 the arbitrator can make all the orders a High Court judge can, except committal orders, interim injunctions and orders over third parties (unless they consent)
- Art 8.1 “the arbitrator will decide all procedural and evidential matters...subject to the right of the parties to agree any matter”, but Art 8.3 does give the arbitrator the power to limit expert evidence
- Art 9 “the parties are free to agree as to the form of procedure...and in particular to adopt a documents only procedure...if there is no such agreement, the arbitrator will have the widest possible discretion”

The “standard” procedure is as follows:

1. Parties sign the ARB1FS and appoint the Arbitrator
2. The Arbitrator writes to the parties and canvasses views as to procedure
3. A directions hearing is arranged, at the end of which the arbitrator makes an order setting out how the rest of the arbitration is to be conducted
4. The parties follow the directions and produce their evidence and proposals
5. The dispute is resolved either by attendance at an arbitration to give oral evidence, or by the arbitrator conducting a documents only arbitration. They write up an “award” (a judgment) which contains the form of an order
6. The parties convert the decision into a court order and submit it for the court’s approval.

One of the issues that creates the most concern about arbitrations is the belief that you cannot appeal the outcome. In fact, the ability to challenge an arbitral award is contained not within the IFLA rules but with the Arbitration Act itself. The grounds are:

1. That the arbitral tribunal did not have substantive jurisdiction to make the award (S.67)
2. That there was a serious irregularity affecting the proceedings, the tribunal or the award (S.68). Examples of serious irregularity are: failure to deal with all the issues, failure to adopt the procedure which had been agreed, uncertainty or ambiguity of the award.
3. On a point of law (S.69)

If these grounds can be made out, then an application for permission is made to the court. If permission is granted, the court can:

1. Remit the case to the arbitrator for reconsideration
2. Set the award aside in whole or in part
3. Declare the award to be of no effect

No application may be made until the party has exhausted the routes of seeking to go back to the arbitrator seeking the correction of the award, or an additional award.

# Appeals - Haley

- In *Haley v Haley* [2020] EWCA Civ 1369 the Court of Appeal confirmed that appeals from arbitration awards in family cases should be treated in exactly the same way as appeals from judicial decisions.
- Whilst TOLATA proceedings will generally be civil proceedings, Haley is a Court of Appeal authority, and could be relied upon in a civil appeal.
- In general the court system really wants to encourage and support the arbitration process and this decision was designed to neutralise the concern that many litigants had about not being able to appeal.

The ARB1FS in its standard form provides that the parties agree to be bound by the IFLA rules.

Art 14 of the IFLA rules provides that “unless otherwise agreed” the general rule is that the parties shall bear the costs of the arbitrator equally, and that there will no order requiring one party to pay the costs of the other party. However, the arbitrator retains an overriding discretion to make a costs order, taking to account a range of factors which are identical to the FPR28.3 factors.

In TOLATA proceedings it would be possible to agree at the beginning that the “no order as to costs” principle did not apply, and that costs would be determined in accordance with the normal CPR criteria. No automatic costs budgeting.

# Why arbitrate?

Arbitration	Litigation
Duration: you could go from ARB1FS to a consent order in a matter of week	Duration: Claim form to final order at a final hearing – about a year, could be more in some courts.
Costs: Shorter duration means less correspondence, fewer court appearances, fewer brief fees. Bespoke procedure means the evidence can be tailored to that which is relevant	Costs: One year of litigation in a “normal” medium money case can easily see costs of £50,000. Three court hearings, no control over disclosure, no control over the timetable
Tribunal: you choose someone you know to be competent and specialist	Tribunal: you may get an excellent specialist practitioner with nothing else in their list. Or you may get a PI specialist with another 20 cases to do.

# Why arbitrate

Arbitration	Litigation
<p>Process: you choose your judge, your venue, your procedure. You are not competing with other cases.</p>	<p>Process: unsatisfactory court buildings, disorganised lists, unpredictable judges, chaotic court offices, lost documents.</p>
<p>Result: no extempore judgments. The arbitrator will take time to write a careful award with no “gaps”. Ideally they will set a date when the award will be sent out</p>	<p>Result: grumpy tired judges who know they have a full list the next day will give an extempore judgment and can make mistakes.</p>
<p>Post result complications: email the arbitrator. They will email you back and do their best to sort the problem within the shortest possible time frame. If there are issues on the drafting of the order, the court seems to give a quick listing (quicker than if you were in “normal” court proceedings)</p>	<p>Post result complication: write to the court. About three weeks later they will tell you to make an application. Pay your issue fee. About 2 months later you might get a 15 minute hearing. The judge says they do not have the time to deal with a complicated application. It is set down for a hearing in 3 months.</p>

# How Can We help?

- We provide the arbitrator
- We can arrange the venue: we can accommodate arbitrations in both London and Winchester chambers (the main room and break out rooms for each party), or you can use a neutral location such as the IFLA offices in Bloomsbury Sq or hired conference facilities, a swanky hotel, your own offices, etc.
- We can negotiate a flat fee to include a directions hearing, the hearing itself and the writing of the award.
- We can liaise with all parties to agree the dates
- This is a bespoke process, whatever the clients think is appropriate can be arranged. We are happy to think outside the box.

# Mediation

- Family mediations are usually undertaken by a mediator who is accredited by the Family Mediation Council conducting sessions with both parties to a dispute, in the same room and normally without advocates. If they come to an agreement it is non-binding and privileged.
- For very simple or low money cases, it can work, but it has big limitations

# Caucus Style Mediation

- Our team of mediators are mainly trained in caucus style mediations. Each party is generally represented, and they remain in the own room with their advocate.
- The mediator shuttles between the parties conducting negotiations (and/or exchanges of information)
- It can be a condition of the mediation that any settlement is incorporated into a consent order

# Benefits of caucus mediation

- TOLATA cases can be legally complex and often come alongside Schedule 1 applications which can be financially complex. Expecting parties to negotiate without the benefit of legal advice is setting them up to fail.
- In many cases one party will not want to sit face to face with their ex-partner because they feel that the balance of power in the relationship is against them. Caucus mediation removes all of that conflict.

- An ENE is a hearing at which a judge, with access to the bundle including all the WP correspondence, hears submissions from both parties and then gives a non-binding indication of the likely outcome of the case if it went to trial.
- The parties then decide if they are able to settle their claim along the lines of the indication
- If the ENE does not result in settlement, the judge has no further involvement in the case and the court file is stripped of all privileged documents.
- If settlement is reached, the terms of the agreement can be approved by the court and the case effectively ends.
- The court's only power at an ENE/FDR is to approve a settlement or make directions for trial.

# Private FDR/ENEs

- A PENE/PFDR is where the parties instruct a specialist barrister/lawyer to carry out the same function, but outside the court system.
- Unlike a mediation, the Evaluator does not conduct the shuttle negotiation, they only give the indication
- Unlike a mediation, where the mediator is there to listen and facilitate a settlement, each party does receive an objective assessment of the strengths and weaknesses of their case
- The settlement is drawn up and signed in the usual way and the parties submit the order for the court's approval.
- We can accommodate a PENE/PFDR in chambers at each of our centres, or we can travel to you.

# Benefits of private ENE/FDRs

- You choose your judge
- You choose your date and venue
- You choose at what stage in the disclosure process it should happen. This helps to control costs. You can do more than one
- They are lower risk than arbitrations as the judge has no power to impose anything upon the parties.
- They do not involve staying other proceedings so they do not cause delay
- They are private and confidential
- You could choose to conduct a documents only ENE/FDR in order to reduce costs

# Ploughing on regardless

- Churchill v Merthyr Tydfil B.C. [2023] EWCA Civ 1416 sets out that a civil court does have the power in civil proceedings to stay a claim and oblige parties to engage in NCDR as long as it is not foreclosing their access to the court (which in practice means the court can compel mediation and ENE/FDR, but not arbitration)
- In family proceedings, changes to the FPR 2010 now give the family court power to stay a claim if it thinks that the parties should engage in NCDR, but it stops short of being able to compel parties to engage in mediation.
- In either case, the costs consequences of a refusal to engage can be painful