

# WESTGATE CHAMBERS



The Bank of Mum & Dad – Interveners  
claims in Financial Remedy.

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## Situations where the issue of the joinder of an individual will arise are:

Where a **party** to a marriage asserts that the other party is beneficially entitled to a property held in the name of a third party. The court will need to determine this issue as part of the financial remedy application, but if the third party is not joined, then they will not be bound by the court's findings. Orders impacting the property, such as an order for sale, could not be enforced against the third party without separate civil proceedings.

Where the **third party asserts** that they have a beneficial interest in a property held in the names of one (or both) of the parties. If the court were to make an order in relation to the property, again that order could not be enforced without further litigation.

## The Test

The test that the court must apply when considering whether to join a third party is set out in FPR r 9.26B(1): a person or body may 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.

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## Consider whether it is proportionate?

\* This was addressed by the Court of Appeal in *Behbehani v Behbehani and others* [2019] EWCA Civ 2301

"... it frequently happens, particularly in so-called big-money cases, that the court is faced with a number of issues as to the ownership of assets with a variety of third parties identified as the beneficial owners. It would be wholly disproportionate to insist that, even where the wife is not seeking the transfer of the assets, all such persons should be joined to the proceedings and the issue of ownership determined before any financial remedies order can be made. There may be cases where joinder is appropriate in those circumstances, but it should certainly not be the rule."

## Procedure

- The application for joinder is made under Part 18 using Form D11. The application will need to be supported by evidence of the proposed party's connection with the proceedings.
- It is important that the application is made at an early stage
- Once the third party has been joined, the dispute with the third party must be approached on the same basis as if it were being determined by the Chancery Division. The court will give directions for the issue to be fully pleaded by points of claim and points of defence. Witness statements will also be directed.

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## Costs

- The no order for costs principle in FPR, r 28.3 does not apply as between the spouse seeking the joinder of the third party and third party who has been joined. Under FPR, r 28.2(1), the general rule under CPR, r 44.2(2) (that costs follow the event) is also not applied in family proceedings. The court therefore begins with a 'clean sheet', and the court can make such order as to costs as it thinks just (FPR, r 28.1).
- The party who sought the joinder of the third party must therefore bear in mind, that if the third party succeeds in proving his or her case, they may well be successful in claiming costs from the party who caused them to be joined.

## To join or not to join?

- Joining a third party will inevitably lead to an increase in costs and can also cause delay in the resolution of the proceedings. The approach that will be taken will depend on the facts, and whether the orders sought from the court are likely to need to be enforced against a third party. It is clear that whichever path is taken, the issue must be considered carefully at an early stage

## TOLATA

- If a dispute arises in financial remedy proceedings between one of the spouses and a third party in relation to the beneficial ownership of a property, the third party should be joined as a party to the financial remedy proceedings pursuant to FPR 2010, 9.26B
- The question of the beneficial ownership must, however, be determined by reference to the law of property. The discretionary exercise pursuant to the MCA 1973, s 25 does not apply to the dispute between the third party and the spouse. In *TL v ML (ancillary relief: claim against assets of extended family)*<sup>1</sup>, Mostyn J listed the four steps which should be taken in such cases:

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## 4 steps

1. The third party should be joined to the proceedings at the earliest opportunity;
2. Directions should be given for the issue to be fully pleaded by points of claim and points of defence;
3. Separate witness statements should be directed in relation to the dispute; and
4. The dispute should be directed to be heard separately as a preliminary issue, before the financial dispute resolution.

See also *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467, in which Munby J stated that, although he agreed with the approach, the appropriate directions would depend on the facts of the individual case.

These cases are VERY fact specific

The commencement of separate TOLATA 1996 proceedings in such cases is discouraged by the court and is viewed as 'misconceived and unnecessary'<sup>1</sup> since the third party can be joined to the financial remedy proceedings and the Court can determine and declare the beneficial interests by reference to property law principles within those proceedings.

The family court has jurisdiction to determine the property claims of **intervenors** joined to the financial remedy proceedings, despite the fact that the Family Court has no jurisdiction under TOLATA 1996, as it is fundamental to the court's jurisdiction that the court should know over what property the court should exercise its adjustive powers.

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Where separate TOLATA proceedings are issued, the court hearing the financial remedy proceedings must not attempt to forecast the outcome of the TOLATA proceedings. Instead, the court may:

adjourn the financial remedy proceedings to await the outcome of the TOLATA proceedings; or

- allocate both sets of proceedings to be heard by the same judge; or
- ensure that both sets of proceedings are 'prepared and despatched in tandem
- Where, however, the third party is a non-UK resident and there are the equivalent of TOLATA proceedings in a foreign jurisdiction, the court may nevertheless refuse to adjourn the financial remedy proceedings to await the outcome of the foreign proceedings where the timetable for the foreign proceedings is uncertain and there would be financial prejudice to one of the spouses as a result of delay
- Where a third party has been joined to financial remedy proceedings, the beneficial interests must be determined by reference to the law of property; but the applicable rules will be the FPR 2010 and not the CPR 1998

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## Burden

- Where a spouse in financial remedy proceedings alleges that a property registered in the name of a third party is actually beneficially owned by the other spouse, the burden is on the claimant spouse to apply to join the third party to the financial remedy proceedings. Where, however, a property is registered in the name of a spouse and that spouse alleges that it is beneficially owned by a third party, the burden of applying for the joinder of the third party rests equally with the third party and with the spouse who alleges that the beneficial ownership differs from the legal ownership
- Even though the burden to apply for joinder of a third party may not rest with one of the spouses, that spouse may nevertheless wish to apply for joinder in order to aid enforcement for the reasons explained by Mostyn J in *Fisher Meredith v JH and PH* (*financial remedy: appeal: wasted costs*)

## Directions required for Preliminary Issue Hearing

- Parties joined as Intervener's/Joined as parties
- Evidence served on them
- Points of Claim
- Points of Defence
- Points of reply (if so advised)
- Standard Disclosure
- Specific Disclosure
- Witness Statements
- Expert Evidence
- List for preliminary issue hearing BEFORE FDR



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## Common evidential problems

- Those of you who have dealt with **intervenor** cases will know that one of the common problems is that a lot of the case will rest on oral evidence, on unwitnessed conversations and there will often be a lack of independent evidence. In my experience it often helps to think creatively about what documentary evidence might be available over and above the usual documentary evidence from the conveyancing file. It is surprising how often other random bits of paper can provide assistance: e-mail correspondence, letters, receipts, bank statements, even birthday cards can be critical!