**Chapter 5**

**Question 1: What do you understand to be the difference between express, resulting, and constructive trusts? What role does the settlor’s intention play in the creation of each of these types of trust?**

The different categories of trust are discussed at **5.2-5.6**. It is noted at **5.2** that the express, resulting and constructive classification is not universally accepted, but it is commonly adopted. The main difference is between express trusts on the one hand and resulting and constructive trusts on the other. Express trusts arise when a settlor has successfully exercised the power to set up a trust, and so the settlor’s intention is crucial to them, even if it is not the only factor in proving the existence of an express trust (see e.g. **5.10** discussing the formality requirement in s 53(1)(b) of the Law of Property Act 1925). In contrast, resulting and constructive trusts arise for some reason other than the settlor’s successful exercise of a power to set up a trust.

This does not mean, however, that the settlor’s intention is irrelevant to resulting or constructive trusts. It can play a very important role in such trusts, as suggested, for example, by the very name of the ‘common intention constructive trusts’ discussed at **5.22-5.69**. Intention has also been said to play an important role in resulting trusts, even if that intention is sometimes presumed from the existence of certain facts (e.g. payment for the property) rather than proved directly (see **5.13-5.16**).

**Question 2: Explain the operation of: (i) the presumption of resulting trust; and (ii) the presumption of advancement. In what circumstances does each apply?**

As discussed at **5.13**, the presumption of resulting trust applies where B, without receiving anything in return, either transfers B’s property to A, or pays all or part of the purchase price of property that is then held by A. In such a case, it is said that a trust for B’s benefit is presumed, so that A must hold the property entirely for B’s benefit (where B transfers the property to A without receiving anything in return, or where B paid the whole purchase price) or A must hold the property for B’s benefit, to the extent of B’s contribution to the purchase price. Of course, a trust for B will not always arise in such cases: if it is shown, for example, that B simply intended to make a gift to A, no trust will arise.

The presumption of advancement is said to apply in particular cases where the relationship between A and B makes it likely that B did intend a gift to A. Historically, it has been limited to a narrow set of relationships: where B is A’s father, or A’s husband (see **5.14**). Its scope has long been recognized as outdated, and provision has been made by statue for its abolition. Where the presumption operates, it is presumed that B intended to make a gift to A, although this presumption too can be rebutted by evidence that B did not, in fact, intend a gift.

In the modern law, where the legal process gives a court more opportunity to work out the parties’ true intentions, these presumptions have relatively little weight and it is rare for them to be decisive. As shown by, for example, *Marr v Collie* (2017) (see **5.29**), the courts will prefer to ascertain the parties’ intentions directly, without needing to rely on such presumptions.

**Question 3: What initial presumption of ownership is drawn in the following cases and, in each, in what circumstances and for what purpose might a common intention constructive trust be claimed by B?**

* + 1. **A is the sole legal owner of a home where she lives with her cohabitee B.**
    2. **A and B are joint legal owners of the home in which they cohabit.**

As noted in the guidance to Question 2, and as shown by, for example, *Marr v Collie* (2017) (see **5.29**), the courts will prefer to ascertain the parties’ intentions directly, and so initial presumptions will usually only play a small role in establishing such intentions. The logic of *Stack v Dowden* (2007) is that the position in equity will mirror that at law: so in case (a), the starting point is that there is no trust, and A simply holds the property for her own benefit; whereas in (b), the starting point is that A and B are joint tenants in equity as well as at law (although there are some comments in *Stack* that might suggest the starting point is that A and B have equal shares as tenants in common in equity: for the difference between a joint tenancy and a tenancy in common, see **6.6-6.20**).

This means that B may wish to claim a common intention constructive trust in order to depart from the starting point that the position in equity mirrors that at law. So, in (a), a trust of some sort will be necessary if B is to have *any* beneficial interest in the property. This would be important if, for example, B had made a financial contribution to the acquisition of the property, and had not intended thereby to make a gift to A. In (b), a trust will be necessary if B wants to show that B has a distinct share in the property which is greater than A’s share. Again, this would be important if, for example, B has made a greater financial contribution than A to the acquisition of the property.

**Question 4: What do you understand to be the difference between an inferred and imputed common intention and what role does each of them have in relation to the common intention constructive trust?**

As set out at **5.38**, Lord Neuberger’s explanation of the distinction between an inferred and an imputed intention is very helpful – essentially, inferring is finding an intention that the parties actually held; imputing is attributing an intention even if there is not sufficient evidence to find that the parties in fact held it. Inference is a perfectly standard judicial technique; imputing is not.

As a result, the role of imputation in the common intention constructive trust is carefully limited. Crucially, it cannot be used when dealing with the initial question of whether A and B intended their beneficial ownership of the property to differ from the position at law ie the question of whether there is a common intention constructive trust at all. It is only once such an intention has been found, either from evidence of an express agreement or through inference, that imputation may come in: at the later stage of ascertaining the specific size of the beneficial interests under the trust. If there is no express agreement as to their size, and no such common intention can be inferred, the court may impute such an intention, considering what would be fair given the parties’ dealings in relation to the property (see **5.40-5.42**).

**Question 5: What result does the doctrine in *Rochefoucauld v Boustead* provide when T reneges on the oral agreement in the following transactions?**

1. **A transfer of land from B to T on T’s oral agreement to hold the land on trust for B.**
2. **A transfer of land from X to T on T’s oral agreement to hold the land on trust for B.**

As discussed at **5.73**, it is useful to distinguish between ‘two-party’ cases, such as (a), and ‘three-party’ cases, such as (b). *Rochefoucauld* (1897) was itself a ‘two-party’ case and so covers situation (a). The oral agreement for T to hold on trust for B is not recorded in writing, and so B the terms of s 53(1)(b) of the LPA 1925 prevent B proving an express trust. The doctrine in *Rochefoucauld* nonetheless allows the court to recognise a trust. On one view, the trust is just an express trust, with the court preventing T from relying on the formality provision as a means to commit a fraud on B (see **5.76**). On another view, the trust is a constructive trust, arising to prevent the particular form of unconscionable conduct by T that consists in acquiring property as a result of a promise relating to that property, and then attempting to renege on the promise.

In a ‘three-party’ case, there is an argument that the need to prevent fraud, or a particular type of unconscionable conduct, by T could instead be met by finding that T holds on trust for X, not for B (see **5.74**). Certainly, that would prevent T profiting from reneging on the oral promise. However, on the second view of *Rochefoucauld* above, which focusses on the need to enforce T’s promise, even in a three-party case, the agreement to hold on trust should be enforced, and so T will hold on trust for B. *Neale v Willis* (1968) provides support for such a result (see **5.73-5.74**).

**Question 6: In what circumstances does a constructive trust arise under the *Pallant v Morgan* equity? What do you consider to be the distinctive feature or features of this form of constructive trust?**

There is some controversy over the nature and operation of the ‘*Pallant v Morgan*’ equity: ie the principle, recognised in the case, on which B can informally acquire a right. In a recent Court of Appeal case, *Kahrmann v Harrison-Morgan* [2019] EWCA Civ 2094, Henderson LJ at [127] stated that: ‘The whole subject is ripe for consideration by the Supreme Court.’

The basic outlines of the principle, and the two main explanations of it, can be seen in *Pallant v Morgan* (1953) itself: A acquired property at an auction, at which B had also planned to bid. B had pulled out of the bidding, however, after A and B had agreed that only A would bid, and, if A succeeded in buying the property, A and B would then share the property between them. That agreement was too uncertain to be contractually binding – and such an oral agreement cannot now be a valid contract for the sale or other disposition of an interest in land as it does not meet the formality requirements set out by s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (see **4.5-4.31**). Nonetheless, B’s claim succeeded. One explanation is that A was acting as B’s agent, and as such A would be acting in breach of fiduciary duty if A pursued only his own interests and ignored those of B. A constructive trust, in B’s favour, of the property acquired by A might then be a response to that breach of fiduciary duty by A (see **5.82**). On that view, the trust arises for a specific reason which is different to that motivating a common intention constructive trust or a trust arising under *Rochefoucauld v Boustead* (1897).

A different explanation is that the principle is based on ensuring that, where A acquires property having made a promise in relation to that property, A’s promise is enforced. A constructive trust, in B’s favour, of the property acquired by A would then arise where A’s promise was to hold the property for B’s benefit as well as for A’s. On that view, the reason for the trust is very similar, and perhaps even identical, to one of the explanations of the trust arising under *Rochefoucauld v Boustead* (1897) (see **5.78**).

**Question 7: What is the ‘doctrine of anticipation’? Can you explain when it can give rise to a constructive trust?**

As noted at **5.87**, the ‘doctrine of anticipation’ is a name which can be given to the principle that lies behind the vendor-purchaser constructive trust (see **5.83-5.85**) and the finding of an equitable lease in *Walsh v Lonsdale* (1882) (see **5.87**). It is a principle which can give rise to an equitable interest in B, where A is under a binding duty to confer a recognized property right on B, but has not yet performed that duty. The equitable interest acquired by B as a result depends on the particular property right that A must confer on B, and so the doctrine will not always give rise to a trust: in *Walsh v Lonsdale*, for example, it gave rise to an equitable lease, as A’s duty was to grant B a lease. A trust will arise if, for example, A’s duty is to transfer A’s property right to B (as in the vendor-purchaser constructive trust), or to hold A’s property for B’s benefit.

**Question 8: What are the three main elements of proprietary estoppel? Can you explain how each was present in *Thorner v Major*?**

As noted at **5.97**, Lord Walker in *Thorner v Major* (2009) described the three main elements of proprietary estoppel as a representation or assurance by A, reliance on that representation or assurance by B, and detriment to B as a result of B’s reasonable reliance.

In *Thorner* (see **5.95**), the assurance by Peter (A) was not an explicit promise to David (B), but was established by A’s conduct over 15 years. For example in 1990, A gave B a bonus notice relating to two assurance policies on A’s life, saying ‘That’s for my death duties’. The House of Lords concluded that, overall, there was a sufficient assurance, as it was reasonable for someone in B’s position to understand A as having made a serious assurance which was capable of being relied on.

B relied on this assurance by working on A’s farm for 30 years for very little pay. As a result, if A was entitled to resile from his assurance, B would suffer detriment in that he had given up the chance of better paid work for many years, and structured his life around the expectation of inheriting the farm.

**Question 9: In what ways does a proprietary estoppel claim, even if based on a promise, differ from a contractual claim?**

As discussed at **5.101**, the reasoning of Hoffmann LJ (as he then was) in *Walton v Walton* (1994) provides a good example of how a proprietary estoppel claim, even if based on a promise, differs from a contractual claim. Unlike a contract, it does not give rise to an immediate duty on A to perform the promise. Rather, proprietary estoppel ‘looks backwards from the moment when the promise falls due to be performed’ and asks if it would now be unconscionable for A to leave B to suffer some detriment as a result of B’s reliance on that promise. This has a number of consequences.

First, it means a promise can give rise to a proprietary estoppel claim even if it is not contractually binding because, for example, no consideration has been provided, or A and B had not intended to enter into an immediate legally binding agreement, or because it has not been recorded in writing as required by s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (see **4.5-4.31** and **5.114-5.116**). Second, it means that, if A’s circumstances change in a significant and unexpected way, a court could take that into account even if the contractual doctrine of frustration would not apply (see **5.101**). Third, whilst remedies for a breach of contract generally aim to put B in the position that B would have been in had the contract been performed, in a successful proprietary estoppel claim, there is no guarantee that B’s expectation will be protected: see e.g. *Jennings v Rice* (2001) (**5.119**).

**Question 10: What are the differences between a common intention constructive trust and a proprietary estoppel claim?**

A common intention constructive trust is a means for B to acquire, informally, an equitable interest in A’s land (or land in the joint names of A and B). Proprietary estoppel also does not require formality and equally can (although does not always: see **5.93**) lead to B’s acquisition of an equitable interest in A’s land. Ideas of agreement between A and B (or a promise by A), and also of detriment to B, are also evident in both cases.

However, as discussed at **5.135-5.138**, there are some important differences between a common intention constructive trust and a proprietary estoppel claim. Here are two of them, but you may be able to think of more. First, as to the right acquired by B. As Lord Walker noted in *Stack v Dowden* (2007), a proprietary estoppel claim gives B a ‘mere equity’ which need not lead to B’s acquiring a right under a constructive trust, or indeed any equitable interest at all – in some cases the equity can be satisfied by an order that A pays money to B (see **5.137**). Second, as to the requirements for the claim: a common intention constructive trust depends on a common intention as to the beneficial ownership of the land, but a proprietary estoppel claim can be based on a promise with different content, as seen in *Southwell v Blackburn* (2014) (see **5.138**).