

Chapter 13

Question 1: What do you consider to be the main advantages and disadvantages of the joint tenancy and tenancy in common as forms of co-ownership? What factors would you take into account in advising co-owners whether to hold their home as beneficial joint tenants or tenants in common?

This question requires you to assess the two types of co-ownership recognised in English law. These different types of co-ownership are explained in part 2. We have seen that the key practical difference between them is the operation of survivorship in the joint tenancy. In assessing their advantages and disadvantages, you may find it useful to consider both the internal perspective (the co-owners themselves) and the external perspective (the relationship between the co-owners and third parties). It is also useful to keep in mind that co-ownership of legal title is confined to the joint tenancy, while in equity co-ownership may take either form (as we have considered in part 2).

Joint tenancy

- **Advantages:** the principal advantage is for third parties, for whom the legal joint tenancy ensures a single and indivisible legal title. This enables third parties to deal with confidence with the legal owners collectively, without any risk that the legal title has been fragmented by individual acts.
- The operation of survivorship to leave the last surviving joint tenant as sole owner may be considered an advantage in some circumstances. This may be the case, for example, where the co-owners are a couple who wish to ensure that their house becomes wholly owned by the survivor on the death of the first.
- **Disadvantages:** for the co-owners, the principal disadvantage is potentially the operation of survivorship. This operates as a disadvantage if the consequences of survivorship do not accord with the parties' wishes. On the death of a joint tenant, he or she has no share in the land to pass under their will, but their interest survives to the remaining joint tenants; the joint tenancy is a gamble on longevity; the longest surviving joint tenant will become the sole owner.
- The joint tenancy is inflexible – it does not recognise individual shares (for example, to take into account different contributions to a property) and co-owners do not have shares to deal separately with “their” property, though these disadvantages are more theoretical than real as through severance joint tenants can become tenants in common and, as such, deal separately with their own share (as discussed in part 2.3).

Tenancy in common

- **Advantages:** the tenancy in common offers co-owners flexibility – their individual shares are recognised and can be dealt with separately; each co-owner has a share to pass under their will on their death.
- **Disadvantages:** the principal disadvantage is that third parties who deal with a tenant in common will only obtain rights over that party's share.

These advantages and disadvantages should be taken into account when advising co-owners whether to hold their home as beneficial joint tenants or tenants in common. In particular, co-owners should take into account that joint tenants do not have shares in the land that can be dealt with individually and the operation of survivorship. These factors may make the joint tenancy appropriate for a home purchased by a married couple or cohabitantes who intend it to be kept by the longest survivor. However, a beneficial joint tenancy is unlikely to be appropriate where a house is bought as a home by a group of friends as a means of accessing the housing market, or where property is bought as an investment.

Question 2: Assess the methods by which a joint tenancy may be severed (i) unilaterally, by one joint tenant and (ii) mutually, by all of the joint tenants. What changes, if any, do you consider desirable to simplify the current law?

This question first requires you to assess the methods of severance that we have discussed in part 2.3. We have highlighted some of the criticisms of the current rules in part 2.3.7 and you should refer to the extract from Tee

in that part. In making your assessment you may also find it useful to consider the following issues that are highlighted in the discussion in this chapter:

- Is there sufficient clarity in determining what constitutes written notice for the purposes of section 36(2) of the LPA 1925?
- Is it possible for severance to occur through written notice without a joint tenant being aware that this has happened? (see part 2.3.1)
- Is the current operation of severance on a mortgage by one joint tenant (as an act operating on his or her share) satisfactory? Would it be possible and preferable to suspend the joint tenancy? (See part 2.3.2.)
- What specific difficulties have arisen where a joint tenant dies during the course of their bankruptcy? Does section 421A of the Insolvency Act 1986 (inserted by the Insolvency Act 2000) provide a satisfactory means of dealing with such cases? (See part 2.3.2.)
- Is it possible (or necessary) to draw a clear demarcation between the operation of severance through mutual agreement and through a course of dealings? (See part 2.3.3 and 2.3.4).

Question 3: How does the underlying ethos of the trust of land differ from that of the trust for sale? To what extent is this change in ethos reflected in the rights of the beneficiaries?

This question requires you to consider the policy underlying the trust of land and how this differs from the trust for sale. The trust of land was based on recommendations made by the Law Commission and a useful starting point is the Law Commission's explanation of the trust, extracted in part 5. As we have seen in part 5, the key change in ethos is that the trust of land provides a form of regulation suited to the use of land as a home, reflecting the modern trend of owner-occupation. This is in contrast to the trust for sale which, with the imposition of a duty to sell, reflected an investment ethos. It made no sense where a house was bought as a home to impose on the purchasers an immediate binding *duty* to sell and only a *power* to postpone sale. The clearest manifestation of this change as regards the rights of the beneficiaries is the grant of a right to occupy. This is dealt with in sections 12 and 13 of the Trusts of Land and Appointment of Trustees Act 1996 and is considered in part 5.3. As we have seen in that part, under the trust for sale the imposition of the duty to sell and the doctrine of conversion ran contrary to beneficiaries claiming a right to occupy. However in practice the doctrine of conversion was not invariably applied and the existence of a right to occupy had been recognised by the courts, although its scope remained uncertain.

The change in ethos is also reflected in other ways in which the trust of land operates in relation to the beneficiaries. In particular it is reflected in the beneficiaries' right to be consulted under section 11 of the Act (considered in part 5.3) and in the rules governing sale of land (discussed in part 5.4 and the topic of question 4). In these respects, and as regards the right to occupy, care should be taken not to overstate the impact of the change in ethos. As we have seen in our discussion of the trust of land in part 5 the courts had long recognised the artificiality of the trust for sale in the context of the home and had sought to alleviate its effects (for example, by acknowledging that beneficiaries may have a right to occupy). However, the change in ethos of the trust of land has enabled the terms of the statute to reflect the use of land as a home and therefore the beneficiaries' rights to be made more certain.

Question 4: In what circumstances is the court likely to order sale of a home on an application by one co-owner?

Applications to court for sale of a home are considered in part 5.4. A beneficiary would apply to court under section 14 of the Trusts of Land and Appointment of Trustees Act 1996. Section 15 of the Act (extracted in part 5.4) gives a non-exhaustive list of factors for the court to take into account: the intentions of the settlors of the trust; the purposes for which the property is now held; the welfare of children; and the interests of secured creditors. Applications for sale by one co-owner are likely to arise on the breakdown of their relationship where one party wishes to remain in the home while the other now sees the home as an investment to be realised. Hence, the dispute raises the tension between the house as a home and as an investment. The underlying question is whether one party's desire to remain in their home justifies denying the other the return of their investment. Translating this into the factors listed in section 15, the intentions of the settlors and the purposes of the trust are likely to have envisaged joint occupation. This being the case, it will be difficult to

persuade a court not to order sale, unless the house remains a home for children. Even in such instances (as has been seen in part 5.4.1) the court is likely to order sale if this is necessary to protect the interests of secured creditors.