Chapter 11

Question 1: Assess the role afforded to the settlor's intention in the creation of express, resulting and constructive trusts

This question requires you to consider the key way in which the categories of trust discussed in this chapter are differentiated from each other; the role of the settlor's intent in their creation. In section 1, we have outlined the different roles attributed to the settlor's intent in the creation of each type of trust. To answer the question, a good starting point is the extract from Snell's Equity in section 1. However, we have considered the role of intent throughout the chapter in our discussion of the individual types of trust and to assess its role you need to take that discussion into account. In section 2, we noted the debate as to whether a trust the settlor intends to create, but which does not comply with statutory formalities for trusts of land should still be classified as express; a point of significance to the debate as to the classification of trusts arising under *Rochefoucauld v Boustead* discussed in section 5.1.2. In section 3 we considered the two different views on the role of intent in the creation of resulting trusts.

Question 2: Would the following situations, each concerning the purchase of an investment property, give rise to a presumption of resulting trust or a presumption of advancement? Do your answers yield a logical result?

a. **The property is purchased in the joint names of Mr and Mrs X with the purchase money provided by Mr X.**
b. **The property is purchased in the joint names of Mr and Mrs X with the purchase money provided by Mrs X.**
c. **The property is purchased in the joint names of Mr Y and his son with the purchase money provided by Mr Y.**
d. **The property is purchased in the joint names of Mr Y and his son with the purchase money provided by the son.**

To answer this question you should review the discussion of the purchase money resulting trust in section 3.1. As we have seen in that section, this type of resulting trust may arise where a person contributes to the purchase of land in another person's name. However, in some circumstances, due to the relationship between the parties, no presumption of trust is drawn and instead, through the presumption of advancement or gift (discussed in section 3.1.1) it is presumed that a gift was intended. We have seen that the relationships to which the presumption of advancement applies reflect those in which, in the early twentieth century, there was believed to be a moral obligation of support. In modern times, the values on which the presumptions are drawn can appear outdated. The four examples given in this question are intended to highlight some of the apparent anomalies that may arise and, by doing so, lead you to question the logic of the results. At the same time, you should note that the importance of the presumptions (whether of resulting trust or of advancement) has been substantially reduced. It is important to note too that the Equality Act 2010 contains a provision in section 199 for the abolition of the presumption of advancement. However, the provision is not yet in force and will only apply to transfers undertaken after it comes into effect.

- The presumption of advancement applies where a husband purchases property in his wife's name; but not when a wife purchases property in her husband's name. Hence, in (a) it would be presumed that Mr X intended a gift for his wife and the title would be held on trust for Mr and Mrs X. In (b) however, equity would not presume that Mrs X intended to make a gift to her husband. The presumption of resulting trust would apply and Mr and Mrs X would hold title on trust for Mrs X as the sole beneficiary. It should be noted, however, that the operation of the presumption of advancement between husband and wife has received particular criticism: see the extract from *Pettitt v Pettitt* in section 3.1.1. As a result, it would require little evidence in (a) for Mr X to rebut the presumption and for the title to be held on trust for him as sole beneficiary in that situation.

- The presumption of advancement applies where a father purchases property in his son's name; but not where a son purchases property in his father's name. Hence, (c) and (d) yield analogous results to (a) and (b). In (c), the property would be held by Mr Y and his son on trust for both of them; in (d) the property would be held by Mr Y and his son on trust for the son as sole beneficiary.

In these examples the property is described as "an investment property". If the property was being purchased as the parties' home, then different considerations may well apply. The majority of the House of Lords in *Stack v Dowden* doubted the utility of the resulting trust in the context of determining proprietary rights in the home. Instead, the common intention constructive trust is preferred. In *Jones v Kernott*, as we see in section 3.2.2, the Supreme Court went one step further and held that the presumption of resulting trust no longer applies 'in the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage'. In such cases the common intention constructive trust will instead apply. This type of constructive trust is the topic of chapter 12. Once you have read chapter 12 you may find it useful to return to this question and consider how ownership of the property in these four situations would be decided if the property had been purchased as the parties' home. You should also note that the effect of the Privy Council's decision in *Marr v Collie* (see question 3).

Question 3: Does the approach of the Privy Council in *Marr v Collie* lessen the importance of the distinction between the resulting trust and the common intention constructive trust?

In *Stack v Dowden* (which will also be examined in detail in Chapter 12), the members of the House of Lords agreed as to the correct result on the facts, but Lord Neuberger adopted a different approach to the other judges, preferring a 'resulting trust' solution which, when working out the parties' share of beneficial ownership of the property, focussed on the size of the parties' financial contributions to the purchase price and mortgage payments. In contrast, Lord Walker and Lady Hale preferred to minimise the role of the resulting trust when considering rights in a family home, and based their reasoning on the finding of a common intention constructive trust. It is notable that in *Marr*, whilst the judgment of the Privy Council was given by Lord Kerr, it was agreed to by all the members of a panel which included both Lord Neuberger and Lady Hale. Perhaps as a result, the decision in *Marr* reduces the significance of asking whether a resulting trust or constructive trust should apply, as it focusses instead on the underlying question, common to each type of trust, of ascertaining the parties' intentions as to beneficial ownership of the property.

Question 4: What is the nature of the unconscionable of fraudulent conduct that triggers the imposition of the constructive trust under the doctrine in *Rochefoucauld v Boustead*? Compare and contrast this with the conduct required for a trust under the *Pallant v Morgan* trust.

To answer this question you should review the constructive trusts discussed in sections 5 and 6. We have noted in section 4 that unconscionability is the common thread in constructive trusts. However, unconscionability does not exist as a concept at large; the combination of elements required for the imposition of a constructive trust in each application of the doctrine collectively establishes conduct considered to be unconscionable. This question highlights this point by focusing your attention on the nature of the unconscionable conduct that triggers the creation of a constructive trust in two specific doctrines.

Rochefoucauld v Boustead is considered in section 5. We have seen in section 5.1.1 that the conduct that triggers the trust is a transferee's attempt to deny an express trust (that is unenforceable for non-compliance with formalities) pursuant to which land was transferred in order to keep land for his or her own benefit. The *Pallant v Morgan* trust is discussed in section 6 and the nature of the unconscionability in the doctrine is analysed in section 6.2. As with *Rochefoucauld v Boustead*, the trust arises where the trustee reneges on an agreement pursuant to which land has been acquired. However, it must also be shown that the beneficiary relied on the agreement. We have seen that the distinctive feature of the trust (and of the nature of the conduct classified as unconscionable) is that the reliance need not be to the beneficiary's detriment; it is sufficient that it confers an advantage on the trustee. The point of similarity between the doctrines raises a question as to whether they can be rationalised under a broader principle. In section 7 we assess the arguments that have been advanced by McFarlane, Liew, and Gardner in this regard.

Question 5: Is it necessary or appropriate to recognize the *Pallant v Morgan* constructive trust as arising under an independent principle?

Since the *Pallant v Morgan* constructive trust came to prominence in *Banner Homes Group plc v Luff Developments* the relationship between the trust and other equitable doctrines has been scrutinized and its basis has been debated. We have seen in section 6.1 that the *Pallant v Morgan* trust arises only where a number of specific elements are met and that the courts have indicated that there is little room for manoeuvre around those elements. In this respect, the trust is a narrowly defined doctrine. The doctrine may still be considered necessary however if, in the circumstances in which it applies, there is no other means of equitable intervention. For example, we have seen in section 6.2 that in the situations in which the trust operates 'unconscionability' can be found where there is reliance, but no detriment. The absence of detriment would preclude the application of some equitable doctrines (for example, proprietary estoppel) though in practice is likely to feature only in a minority of cases.

However, to assess whether it is appropriate to recognize the trust as an independent principle the basis of the doctrine needs to be considered. As we see in section 6.3, this is a matter on which the Court of Appeal divided in *Crossco No 4 Unlimited v Jolan Limited*. The majority felt bound by authority to hold that the *Pallant v Morgan* trust is an example of the common intention constructive. Etherton LJ rejected this analysis and considered the trust to be based on a breach of fiduciary. If the trust is based on the common intention constructive trust, then it is difficult to explain why detriment is not required, as detriment is a general requirement for that type of trust. If the *Pallant v Morgan* trust is imposed on the basis of a breach of fiduciary duty, however, then – as Yip explains in her article discussed in section 6.3 – it is unclear why those cases that fall within the doctrine have been 'set apart from other cases of breach of fiduciary duty'. Where a breach of fiduciary is found it is doubtful that there would ever be a need or advantage in invoking the *Pallant v Morgan* trust. In *FHR European Ventures LLP v Mankarious* the Supreme Court signalled that 'any benefit acquired by an agent as a result of his agency and in breach of his fiduciary duty is held on trust for the principal'. Hence, a proprietary remedy may be available by establishing a breach of fiduciary duty without the need to demonstrate the specific elements of the *Pallant v Morgan* trust. Therefore, if the trust is based on a breach of fiduciary duty, both the necessity and appropriateness of the doctrine are called into question.