**Chapter 6**

**Question 1: What are the key differences between a joint tenancy and a tenancy in common?**

This question requires you to differentiate between the two types of co-ownership recognised in English law. These different types of co-ownership are explained in Paragraphs 6.6-6.10. We have seen that the key practical difference between them is the operation of survivorship in the joint tenancy – see Paragraphs 6.19-6.20. In assessing their differences, 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 – see Paragraphs 6.11-6.18.

**Dealing with the Co-owned Property**

A joint tenancy ensures a single and indivisible title. This provides an advantage for third parties. They can deal with confidence with the legal joint tenants collectively, without any risk that the legal title has been fragmented by individual acts. Furthermore, the operation of overreaching – see Chapter 11 – ensures that a purchaser or mortgagee who deals with the legal joint tenants is not concerned with the equitable estate, whether held as joint tenants or tenants in common. However, the separate co-owner’s shares in an equitable tenancy in common can present difficulties for third parties when overreaching is not possible. They will have to deal with each tenant in common as they will only obtain rights over each co-owner’s share.

**Inheritance**

Survivorship leaves the last surviving joint tenant as sole owner which maybe the preferred outcome, 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. However, survivorship can present a corresponding problem 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.

**Flexibility**

The joint tenancy is inflexible – it does not recognise individual shares (for example, to take account of different contributions to a property) and co-owners do not have shares to deal separately with “their” property. However, by severing their joint tenancy, joint tenants can become tenants in common and, as such, deal separately with their own share. The tenancy in common offers co-owners more flexibility – their individual shares are recognised and can be dealt with separately and each co-owner has a share to pass under their will or intestacy on their death.

These differences 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 cohabitees 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:** **How may joint tenants sever the joint tenancy: (i) unilaterally; and (ii) mutually? What is the effect of severance?**

This question requires you to consider the methods of severance that are discussed in Paragraphs 6.21-6.53.

Unilateral acts encompass the statutory written notice, an act operating on one of the four unities for instance sale or bankruptcy and one could also say that the effect of one joint tenant killing of another joint tenant is triggered by a unilateral act! Mutual acts encompass mutual agreement and a course of dealings demonstrating a mutual intention to sever.

The effect of severance is, of course, to convert an equitable joint tenancy into an equitable tenancy in common – it is not possible to sever the legal estate nor to sever by will. It is also important to note the effect where only one of several joint tenants severs their interest – see Paragraphs 6.21-6.23.

Some of the criticisms of the current rules are discussed in Paragraph 6.54-6.58 and, in developing your understanding of severance, you will find it useful to appreciate these criticisms and the following issues that are highlighted in the discussion:

* 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 tenancy being aware that this has happened?
* 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?
* Is it possible (or necessary) to draw a clear demarcation between the operation of severance through mutual agreement and through a course of dealings?

**Question 3:** **What are the main ways in which a co-ownership trust can come to an end?**

The termination of co-ownership is discussed in Paragraphs 6.59-6.61.

**Question 4:** **In what ways does the Trusts of Land and Appointment of Trustees Act 1996 reflect the fact that co-ownership trusts commonly exist in respect of the beneficiaries’ home?**

The Trusts of Land and Appointment of Trustees Act 1998 was enacted following the recommendations made by the Law Commission. The impetus for this reform is discussed in Paragraphs 6.64-6.67.

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 Paragraphs 6.77-6.84.

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 Paragraph 6.76) and in the rules governing sale of land (see Paragraphs 6.70-6.74 and the subject matter of Q.5 below). 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, 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. However, the change in ethos of the trust of land has enabled the terms of the statute to reflect the use of land a home and therefore the beneficiaries’ rights to be made more certain.

**Question 5:** **Where a dispute arises as to whether co-owned land should be sold, on what basis will the court resolve the dispute on an application by: (i) one of the co-owners; (ii) the creditor of one of the co-owners; and (iii) the trustee in bankruptcy of one of the co-owners?**

Applications to court to resolve a dispute regarding whether the co-owned property should be sold either by the co-owners or by a third party with an interest in the co-owned land (for example a creditor) are considered in Paragraphs 6.85-6.96. A co-owner or creditor can apply to court under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 and the court will exercise their discretion whether or not to order sale by considering the non-exhaustive list of factors set out in section 15 of the Act. These factors to be taken into account are: 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 whilst 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 into 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, the court is likely to order sale if this is necessary to protect the interests of secured creditors. The approach to disputes between co-owners is considered in Paragraphs 6.98-6.101.

The approach to disputes involving creditors is considered in Paragraphs 6.102-6.120. It is vital to note that the effect of TOLATA is that applications for sale by creditors and trustees in bankruptcy are treated differently. This is a change from the previous law, under which the courts had held that no difference should be drawn between such applications but that, in both cases, sale should be ordered unless there were exceptional circumstances.

Applications by creditors are dealt with according to the criteria set out in section 15 of TOLATA - see Paragraphs 6.102-6.110 and above. These criteria appear to give the court greater discretion in deciding applications, a point apparently confirmed by *Mortgage Corporation v Shaire*. However, subsequent cases cast doubt on the extent of any change. The desire of beneficiaries to remain in their home has not appeared persuasive. Decisions to date indicate that sale will be ordered unless the welfare of minors has been in issue and the courts have been satisfied that postponing sale will not prejudice the creditors

In contrast, applications by trustees in bankruptcy are considered under section 335A of the Insolvency Act 1986 (see paragraphs 6.111-6.120). In relation to the applications by trustees in bankruptcy, after an initial one year adjustment period the court is directed to order sale unless there are exceptional circumstances (see paragraphs 6.119-6.120). The trustee in bankruptcy must, however, make the application within 3 years of the bankruptcy after which they are obliged to return the property to the bankrupt.

Differentiating between creditors and trustees in bankruptcy may be considered justifiable as the latter alone are under a statutory duty to realise the bankrupt’s assets in order to pay their creditors. We have seen that bankruptcy effects severance of a joint tenant’s share through an involuntary disposition – see question 2 above. However, both creditors and trustees in bankruptcy share the same purely economic interest in the land. Ultimately, it has become apparent that the attempt to differentiate between these applications may be futile. Creditors who feel that they may be prejudiced by bringing an application under section 15 may circumvent that provision by seeking the debtor’s bankruptcy and, in this way, obtaining access to the more favourable provisions (from the perspective of creditors) of the insolvency regime.