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Trusts and the home



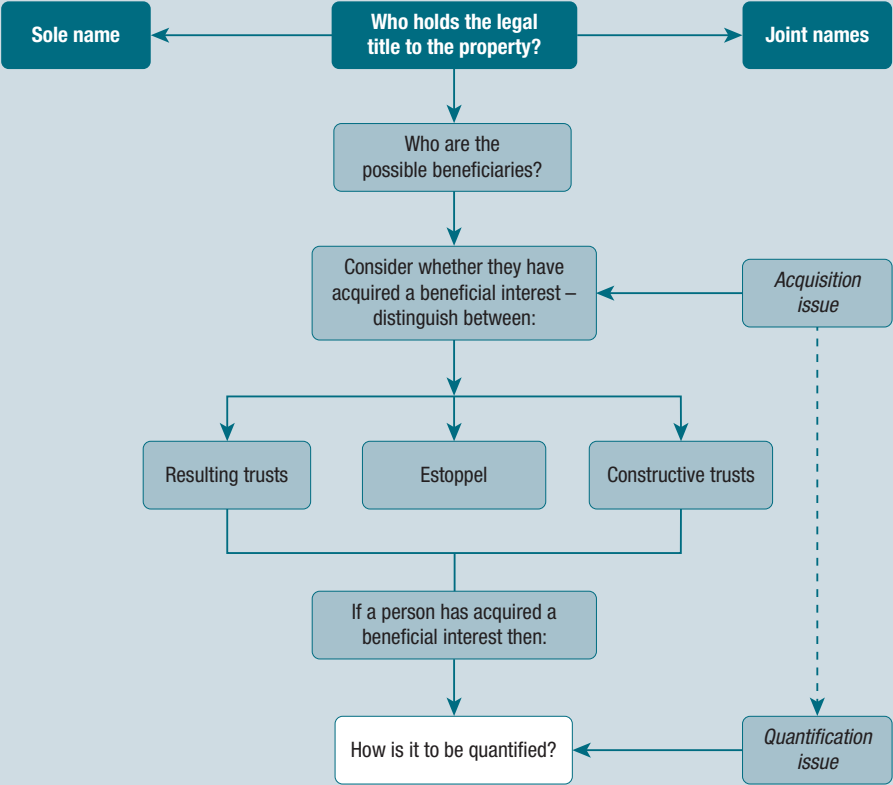
How this topic may come up in exams

This is an area that is very topical, with many arguments about what shape the law should take, and in addition there are plenty of recent cases. The message is to be prepared for an essay question asking you for your ideas on this branch of the law. You will also see that if a beneficial interest in the home exists, a purchaser can be bound by it (see Chapter 2).

In addition, watch for an essay on developments in other jurisdictions on trusts and the home.

Before you begin

It's a good idea to consider the following key themes of trusts and the home before tackling a question on this topic.



A printable version of this diagram is available from www.pearsoned.co.uk/lawexpressqa



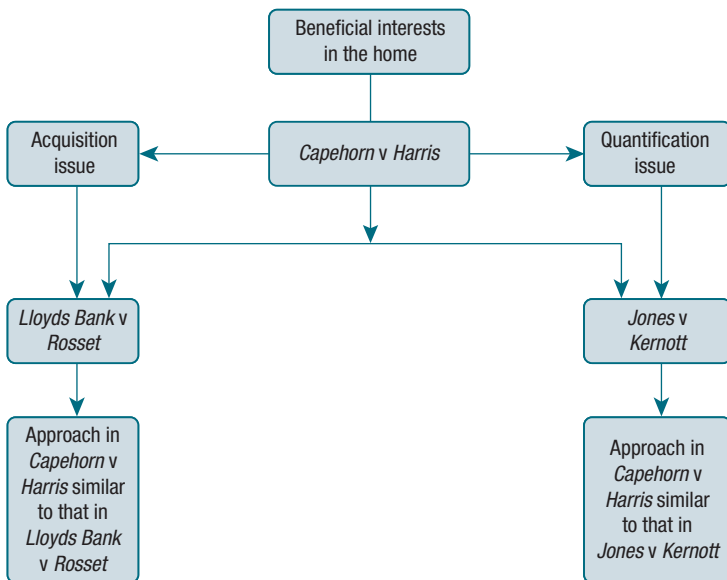
Question 1

'Where an asset is owned in law by one person but another claims to share a beneficial interest in it, a two-stage analysis is called for to determine whether a common intention constructive trust arises.'

Slade LJ in *Capehorn v Harris* [2015] EWCA Civ 955

Critically comment on this statement of the law and, in your answer, consider also whether the present law works fairly in the interests of all the parties.

Diagram plan



A printable version of this diagram is available from www.pearsoned.co.uk/lawexpressqa

Answer plan

- ➔ Explain when this issue is relevant.
- ➔ Distinguish between acquisition of a beneficial interest and quantification of a beneficial interest.
- ➔ Explain the decision of the Court of Appeal in *Capehorn v Harris*, setting it in the context of other cases.
- ➔ Contrast *Capehorn v Harris* with *Lloyds Bank v Rosset* on the acquisition issue, and assess the relative merits of the judgments in each case on particular points.

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- ➔ Then look at what *Capehorn v Harris* said on the quantification issue, and note the similarities with *Jones v Kernott*.
- ➔ Mention that imputed intention can become the imposition by the courts of what they consider to be a fair decision.
- ➔ Consider how the law might develop in the future: is legislation the answer?

Answer

¹ This may seem a complicated start, but it is vital to clear the ground at the start and make clear exactly when this issue is relevant.

² It is important that you make this clear at the start – students often get confused between the law where the title is in a sole name and the law where it is in joint names.

³ This terminology is very useful and saves you time so as to be able to make other points that will earn you marks. Try to use it.

⁴ Although you would not normally say much about the decision of a lower court in a case, here it is useful as the lower court fell into the error that the CA is trying to prevent.

This question relates to claims to a beneficial interest in property in what are known as sole name cases, either where the parties are unmarried or are not in a civil partnership, or where they may be but the issue is not a claim to property arising on the break-up of the marriage or civil partnership.¹

It is not concerned with the situation where the property is in joint names.² This is because Slade LJ was distinguishing between what is known as the acquisition issue, deciding whether a party has a beneficial interest at all, and the quantification issue,³ which determines the extent of the share that the parties have in that beneficial interest.

Capehorn v Harris [2015] EWCA Civ 955, CA, is the latest in a long line of cases in this area and the decision, it is suggested, represents a welcome clarification. The property was in the name of Mrs Capehorn (C) and the claim to a beneficial interest in the property was by her partner, Mr Harris (H), with whom she had cohabited for many years. C had paid the deposit and also funded the mortgage repayments. After H was declared bankrupt, his business was continued by C as a sole trader, but H had the main business contacts and was the dominant force in running it.

The district judge found that there was no actual agreement, but the extent of H's contribution to the business 'should be sufficient to impute an intention to the parties that he should acquire a beneficial interest not only in the business but also in the property'.⁴

The Court of Appeal held that this was in error, as the judge had imputed an intention to the parties at the acquisition stage, whereas any question of imputation arose only at the quantification stage. Instead, Slade LJ, with whom the other judges agreed, applied the two-stage analysis referred to in the question. He held that in deciding

whether a beneficial interest existed at all (the acquisition issue): 'the person claiming the beneficial interest must show that there was an agreement that he should have a beneficial interest in the property owned by his partner'. If this was so, then, at the quantification stage, if there is no agreement as to the extent of the interest, 'the court may impute an intention that the person was to have a fair beneficial share in the asset and may assess the quantum of the fair share in the light of all the circumstances'.

The judgment is notably concise on the law and avoids detailed analysis of earlier authorities. Slade LJ is clear that, when he refers to an agreement, this means not only an express agreement but also cases where one can 'be inferred from conduct in an appropriate case'. Thus, of the three types of intention, express or inferred intention is needed to establish a beneficial interest but, in addition to these, imputed intention will also suffice to establish the extent of the interest.

On the quantification issue, this approach is similar to that of Lord Bridge in **Lloyds Bank Plc v Rosset** [1991] 1 AC 107, HL,⁵ who said that there were two ways in which a party could claim a beneficial interest, both resting on what he called the common intentions of the parties.⁶ One was whether there was any agreement, arrangement or understanding between the parties that the property was to be shared beneficially. If so, the party claiming must show that they have acted to their detriment in relying on this. In effect, the notion of estoppel was used. In the absence of express discussions, the court must rely on conduct to support the inference of a common intention and, said Lord Bridge, in nearly every case the only relevant conduct is direct contributions to the purchase price.

However, there seem to be three differences between the approaches of Slade LJ in **Capehorn** and Lord Bridge in **Rosset**.⁷ First, Slade LJ refers to 'an agreement', albeit that this can be inferred, whereas Lord Bridge speaks of 'common intention'. It is suggested that 'common intention' is to be preferred, as finding an actual agreement can be difficult here. As Waite J said in **Hammond v Mitchell** [1992] 2 All ER 109, Fam D: the parties were 'too much in love at this time either to count the pennies or pay attention to who was providing them'.⁸ Thus, it is likely that, in most cases, intention will have to be inferred from conduct, and this leaves open the question of whether this is the

⁵ Although *Lloyds Bank v Rosset* is not the main authority today, it is still used, as we shall see, and, in addition, to achieve a good mark in this essay, you need to set the law in context.

⁶ Note that we have summarised what these two ways are, because *Lloyds Bank v Rosset* principles can still be important.

⁷ This is the approach that earns you marks: you are adopting a clear analytical approach to the judgments in the two cases.

⁸ This is a nice vivid quote and easily remembered!

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same as imputing an intention, as there may be a fine line between them.

Secondly, Slade LJ did not mention Lord Bridge's often-criticised statement that, in the absence of direct contributions, 'it is at least extremely doubtful if anything less will do'. In fact, Slade LJ's reference to inferring an agreement from conduct seems similar to the approach in **Le Foe v Le Foe** [2001] 2 FLR 970, HC, where the wife contributed to the family economy by paying for general outgoings while the husband made the mortgage payments, and this in itself gave her a beneficial interest, the value of which was increased by her later mortgage repayments. This is welcome. Thirdly, Slade LJ did not use the analogy with estoppel favoured by Lord Bridge. This, in itself, may make it easier to establish a claim, as it will not be necessary to show detrimental reliance on a common intention.

⁹Although most of the interest in *Capehorn v Harris* is in the acquisition issue, do not forget the quantification issue.

When the court comes to assessing the share of the beneficial interest,⁹ Slade LJ is adopting the approach of the Supreme Court in the joint names case of **Jones v Kernott** [2011] UKSC 53, where Lady Hale and Lord Walker said that the fallback position was that 'if the courts cannot deduce exactly what shares were intended, it may have no alternative but to ask what their intentions as reasonable and just people would have been had they thought about it at the time'. However, is this just a cover for the court to impose what it considers a just solution? Lord Wilson thought so when he said in **Jones v Kernott**, 'Where equity is driven to impute the common intention, how can it do so other than by a search for the result which the court itself considers fair?' Have we then reached the stage where the court is simply deciding what a fair result is?

¹⁰Do not forget that the question is asking you whether the law works fairly and so, in addition to adopting a critical approach to the present law, you should look at alternatives.

The basing of rights to a beneficial interest in the home on the intentions of the parties has bedevilled this area of law.¹⁰ Would it be better to abandon it and replace it with searching for a fair result? Alternatively, is the solution legislation? In 2007, the Law Commission Report (2007) No. 307 proposed a scheme whereby parties to a relationship could claim a share in property on the basis of economic advantage or disadvantage. The effect would have been to widen the net for possible claimants, but the Government has shown little interest in its implementation.