

Joint tenancy elements (four unities)

Possession	The entire parcel of land must be subject to the joint tenancy
Interest	The tenants must be holding the same type of interest
Title	The tenants must take under the same document
Time	Joint tenants must take tenancy at the same time; but equity may dispense with this in wills or for a beneficial interest under a trust

Other rules for joint tenancy

Fraud exception	Fraud of one jt is not automatically the fraud of the other: <i>Cassegrain</i>
CA s 25	Companies can hold as jt
CA s 35	If circumstances of death of joint tenants cannot be determined, then presumed the oldest dies first

General law presumptions: *Delehunt v Carmody*

At law	If land was conveyed to two people, then there was a presumed jt
At equity	A tenancy in common in equity was created when <ol style="list-style-type: none"> 1. There is unequal contribution to purchase price (resulting trust) 2. When the parties are mortgagees and a mortgage was made to them jointly 3. Partnerships and joint ventures
Acquisition costs	Purchase price includes acquisition costs such as stamp duty: <i>Ryan v Dries</i>
Family home	No presumption of resulting trust regarding a family home: <i>Jones v Kemott</i>

Tenants in common

Express intention	Parties may create a tic if they expressly provide it
Words of severance	A tic may be created impliedly, particularly when there is an intention the share is passed on death
Missing unity	If there is a missing unity, a tic is created But note there cannot be a missing unity of possession
Operation of law	Some statute may provide for a tic
Severance	A joint tenancy can be severed to leave a tic

Statutory provisions: *Conveyancing Act s 26*

CA s 26(1)	Any instrument that conveys a <i>beneficial interest, with or without the legal estate</i> to two or more persons deemed to be tenants in common, not joint tenants
CA s 26(2)	CA s 26(1) does not apply if conveying to executors, administrators, trustees or mortgagees, or if the instrument <i>expressly provides</i> joint tenancy
Effect of s 26(2)	General law rules apply if it falls under the s 26(2) exception If s 26(2) does not apply, analyse whether s 26(1) applies
Single transferee and the indirect effect of s 26(1)	An indirect effect of s 26(1) if the transfer is to one person, but multiple people contribute to the purchase price, then the parties hold as tic in equity (i.e. presumption of resulting trust) <i>Delehunt v Carmody</i>
Meaning of <i>expressly provide</i>	<i>Expressly provide</i> does not mean the words 'joint tenant' need to be used, it just means 'plainly' or 'clearly': <i>Hircock v Winsor Homes</i> (Hope JA) It is a matter of construction in each case: look at the context, nature of the property, rights to succession e.g. a husband and wife leased together, it was unreasonable to assume the wife's successor would move in after her death

e.g. without specifying tic or jt, a deed conveys land to...

A and B	Presumed tic because s 26(1)
C and D on trust for E and F	C and D will take as jt (general law rule) because they receive no beneficial interest, or they are trustees → s 26(2) stops s 26(1) from applying E and F take the beneficial interest as tic
G and H, as both the executors and beneficiaries	G and H take their shares differently under different capacities: <i>Mitchel v Alblaster</i> G and H, as executors, take as jt: s 26(2) G and H, as beneficiaries, take as tic

Severance of joint tenancy

Guide: tic means tenants in common
X[y] means X holds y share

A+B or jt means joint tenants;
A→B means A transfers his share to B

Before	Transaction	After	Authority
A, B joint tenants	A → C (transfer of legal interest) (*)	B, C tic in equal shares	<i>Wright v Gibbons</i>
A, B joint tenants	A → C (transfer of equitable interest)	A+B jt at law; B, C tic in equity	<i>Corin v Patton</i>
A, B joint tenants	A → B (**)	B becomes sole owner	<i>Cassegrain</i>
A, B joint tenants	A → A (i.e. A transfers to himself)	A and B tic in equal shares	RPA s 97(1), must be a registered transfer Cannot be done in equity: <i>McCoy v Caelli</i>
A, B, C joint tenants	A → X	X[1/3] tic with B+C[2/3] as jt	Same as (*)
A[1/3] tic with B+C[2/3] as jt	B dies	A[1/3] tic with C[2/3]	Right of survivorship
A, B, C joint tenants	A → B	B[1/3] tic with B+C[2/3] as jt	Same as (**)
A[1/3] share tic with A+B[2/3] as jt	A dies	B's estate[1/3] tic with C[2/3]	Right of survivorship
A+B+C joint tenants	A→B and B→A	jt is severed, all parties hold as tic in equal shares	<i>Wright v Gibbons</i>
A+B joint tenants	Parties sell as joint tenants	Joint tenancy attaches to the money, and so does the right of survivorship	<i>Mischel Holdings v Mischel</i>
A+B joint tenants agree to (1) a future sale; and (2) division of proceeds	Parties agree to (1) a future sale; and (2) division of proceeds	The jt is immediately severed <i>in equity</i> Note without (2), it is the case above	<i>Mischel Holdings v Mischel</i>

Leases and mortgages

Effect of leases on a joint tenancy	Grant of a lease suspends the jt for the duration of the lease: <i>Frieze v Unger</i>
Effect of a Torrens mortgage	Torrens mortgage does not sever the joint tenancy because there is no transfer of title
Effect of death of a jt on a mortgage	A+B joint tenants; A grants a mortgage to M, If A dies, M's mortgage is extinguished, but if B dies, M's mortgage is over the whole land: <i>Guthrie v ANZ</i>
Inter vivos transfer of a jt's mortgaged land	A+B joint tenants; A grants a mortgage to M, If A → C, then C's share is encumbered, but B's share is not: <i>Guthrie v ANZ</i>

Termination of the co-ownership (includes both jt and tic)

RPA s 66G	(1) interest vests to trustees (4) may order partition if more beneficial to majority (7) (a) jt is not severed; (b) land converted unless court appoints otherwise [see <i>Harb v Harb</i>]
Effect of s 66G(7)(b)	Once trustees are appointed, beneficial ownership rights become a right to have the sale performed and cannot be stopped unless trustees removed by court: <i>Harb v Harb</i>
Effect of s 66G(4)	Sale is preferred unless partition is shown to be more beneficial to co-owner/s holding more than a half share: <i>Segal v Barel</i>

Co-ownership rights

Right to equal occupation	Co-owners have a right to equal occupation over the whole of the common property: <i>Biviano v Natoli</i>
Assumption of tenant voluntarily out of possession	When a co-owner is out of possession, it is assumed that they have voluntarily chosen not to occupy the land: <i>Forgeard v Shanahan</i> (Meagher JA)

Occupation rent

Agreement	A co-owner may agree to not exercise possession, essentially a matter of contract
Actual ouster	An actual ouster may be circumstantial (e.g. threat of violence) or physical (e.g. changing locks): <i>Biviano v Natoli</i>
Obtaining an AVO is not ouster	If a co-owner ejected pursuant to an AVO, there is no ouster by the person obtaining the AVO: <i>Biviano v Natoli</i>
Constructive ouster	Denying a co-owner has title to the property is constructive ouster: <i>Biviano v Natoli</i>
Breakdown of a domestic relationship	If a domestic relationship has broken down and one co-owner, for practical reasons, can no longer live in the property with the other and must leave, the staying co-owner is liable for occupation rent (this isn't really ouster): <i>Callow v Rupchev</i>
Against a claim for improvements	Can only be claimed when a co-owner voluntarily vacates but is limited to the amount claimed for improvements: e.g. <i>Brickwood v Young</i>

Claim for improvements

Cannot be done at law	One co-owner cannot charge another with the cost of improvements without request: <i>Leigh v Dickeson</i> ; the accounting is done <i>in equity</i> only in various legal proceedings that bring the co-ownership to an end, e.g. sale or s 66G proceedings
Maximum claim	Claim \leq min(amount spent, increased value): <i>Squire v Rogers</i>
Exception to the maximum claim	If a co-owner is claiming they are entitled to a share of the rents and profits, then the cap on the claims for improvements is removed: <i>Squire v Rogers</i>
Charge on the land	A claim for improvement is a charge on the land, enforceable on successors in title, but defeated by indefeasibility: <i>Brickwood v Young</i>
Capacity	A person that made the improvements does not need to be a co-owner if the work done benefits co-owners: e.g. a reversionary interest: <i>Brickwood v Young</i>

Types of claims

Repairs	Repairs must be of an enduring nature to be claimed: <i>Ryan v Dries</i>
Mortgage payments	A mortgage payment is regarded as an improvement: <i>Callow v Rupchev</i>
Other payments	Council rates and water rates are claimable because if left unpaid, there was a charge on the land; insurance and pest control are not an improvement because the benefit was only temporary: <i>Forgeard v Shanahan</i>

Liability for rents and profits

Personal initiative and labour	There is no liability to account for profits arising out of personal initiative and labour (e.g. working a farm): <i>Henderson v Eason</i>
Third party use or occupation	There is liability for benefits which one co-owner receives from third parties in their capacity as co-owner: <i>Squire v Rogers</i>

Severance of a joint tenancy

Parties	Diagram of transaction/s
Effect of the transaction/s	
Sale	Did the parties to the sale also agree to <i>divide the proceeds</i> of the sale?
Leases	Joint tenancy is suspended
Mortgage	Who signed the mortgage? What happens to the mortgage on death of one of the tenants?
Termination under s 66G	Did the interest vest to the trustee? Sale cannot be stopped (<i>Harb v Harb</i>) Is partitioning available? – Benefit to owners of more than half share

Occupation rent

Parties	<p>Party in possession</p> <p>Party out of possession</p>
Ouster	<p>Actual ouster (threat of violence / physical prevention of possession)</p> <p>Was the ejectment pursuant to another law e.g. an AVO?</p> <p>Constructive ouster? What is the party in possession asserting?</p>
<i>Callow v Rupchev</i> principle	<p>Relationship broken down?</p> <p>When was it safe for the party out of possession to return?</p> <p>Amount of occupation rent claimable</p>
Offset against a claim for improvements?	<p>Was one party <i>voluntarily</i> out of possession due to improvements?</p> <p>If yes, occupation rent capped by the claim for improvements (<i>Squire v Rogers</i>)</p>
Rents or profits	<p>Source of rent or profit</p> <p>Did this arise out of personal initiative or from third party possession of the land?</p> <p>Conclusion</p>

Claim for improvements

Parties	Improvement/s made by: Claiming improvement/s from:
Improvement/s claimed 1. 2. 3.	Type of improvement 1. 2. 3. Is it of an enduring nature (<i>Ryan v Dries</i>), or discharge a mortgage / council debt? 1. 2. 3. Is the claim allowed? 1. 2. 3.
Cap for claim for improvements	Co-ownership coming to an end? Yes / No no claim in law, claim only in equity when co-ownership ends (<i>Leigh v Dickeson</i>) Amount spent: \$ _____ Increase in value: \$ _____ Cap for claim for improvements: \$ _____
Rents and profits	Is another co-owner claiming rents and profits from this improvement? If yes, the cap for improvements is removed (<i>Squire v Rogers</i>)