

## TOPICS

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## 1. IDENTIFY INTEREST

### 1.1 Registered interest

1.1.1 A registered proprietor enjoys immediate indefeasibility in the absence of fraud or other exceptions (s 42 of RPA; *Frazer, Breskvar*)

#### 1.1.2 The extent of indefeasibility

Registration validates those terms and conditions which delimit or qualify the estate or interest or are otherwise necessary to assure that estate or interest to the registered proprietor (*Maradona*)

##### (A) Lease

- (1) **[Covenant to pay rent]** The covenant to pay rent delimits or defines the leasehold interest and protected by indefeasibility (*Karacominakis*)
- (2) **[Guarantee]** The guarantee is collateral to the leasehold interest and not protected by indefeasibility (*Karacominakis*)
- (3) **[Option to renew]** The right of renewal obtains indefeasibility on registration of the lease (per Barwick CJ in *Mercantile Credits*)

However Gibbs J left open what the position would have been if the covenant had been void before the registration of the lease.

Where the option to renew is illegal, it has been held that registration of the lease does not validate the option (*Travinto*)

##### (B) Mortgages

- (1) **[Guarantee]** A guarantee is not rendered indefeasible by registration of the mortgage (*English*)
- (2) **[Personal covenant]** A personal covenant in a registered but forged mortgage to pay the amount of the mortgage debt, where the debt exceeds the value of the property, is not protected by the indefeasibility (*English; Chandra*)
- (3) **[Traditional mortgage]** If the mortgagee specifies a sum of money (plus interest) as the amount secured by the mortgage, the charge created by the mortgage will secure the amount so specified even if the document creating the indebtedness is void (*Printy*)
- (4) **[All moneys mortgage]** Whether registration of a forged mortgage allows the mortgagee to enforce its security interest in the land in relation to a debt or obligation arising under an agreement separate from the mortgage is a question of construction (*English*)
  - (a) **[Single borrower/mortgagor]** The mortgage secures nothing if the loan agreement is forged. If no money owed, the mortgagee must discharge the mortgage (*Chandra; Printy*)
  - (b) **[Joint and several borrowers / mortgagors – one forged the other's signature]**
    - (i) If parties intended that the loan agreements be operative with the [fraudster's] signature, mortgagor is entitled to enforce the debt (*Van den Heuvel*)
    - (ii) If parties intended that the loan agreements must be signed by both borrowers, and only one did so, no loan agreement came into effect (*English*)

### 1.2 Unregistered interest

#### 1.2.1 41 problem

- (A) No rights can arise out of the instrument itself because it is not a registered document (s 41(1))
- (B) Courts have consistently recognised the validity of unregistered interests in Torrens title land. Rights can arise out of the transaction that gave rise to the dealing (*Barry; Chan*)

## 3.4.2 Joint tenancy

A joint tenancy terminates

- (A) By operation of the right of survivorship
- (B) By sale or partition

(C) **By severance**

A joint tenant can defeat the operation of survivorship by converting the interest held as joint tenant into one held as tenant in common. By this process, the joint tenancy is "severed" as regards that interest.

For the purpose of severance a joint tenant is regarded as having a potential share in the land.

***Williams v Hensman***

A joint-tenancy may be severed in three ways:

- In the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund - losing, of course, at the same time, his own right of survivorship.
- Secondly, a joint-tenancy may be severed by mutual agreement.
- And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested.

(1) **Unilateral act**(a) **Alienation at law**

|  |  |
|--|--|
| $\begin{array}{c} A + B \\ \downarrow \\ C \end{array}$  | <p>If A and B are joint tenants, and A conveys her interest to C</p> <p>B and C hold as tenants in common because there is neither unity of title nor unity of time</p>  |
| $\begin{array}{c} A + B + C \\ \downarrow \\ D \end{array}$  | <p>If A, B and C are joint tenants and A conveys her interest to D</p> <ul style="list-style-type: none"> <li>• D holds a 1/3 undivided share as tenant in common with B and C</li> <li>• B and C remain joint tenants of the remaining 2/3</li> </ul> |
| $\begin{array}{c} A + B + C \\ \downarrow \\ B \end{array}$  | <p>If A, B and C are joint tenants and A conveys her interest to B</p> <ul style="list-style-type: none"> <li>• B holds 1/3 share as tenant in common</li> <li>• B and C hold the remaining 2/3 as joint tenants</li> </ul>                            |
| $\begin{array}{ccc} A & + & B & + & C \\ \downarrow & & \downarrow & & \\ B & & A & & \end{array}$ | <p>If A, B and C are joint tenants, and A transfers her interest as joint tenant to B, and B transfers his interest as joint tenant to A</p> <p>A, B and C hold as tenants in common in equal (one-third) shares</p>                                   |

***Wright v Gibbons (1949) 78 CLR 313***

**Facts:** Olinda Gibbons, Ethel Gibbons and Bessie Gibbons were registered as joint tenants for an estate in fee simple of certain land subject to registered mortgage.

Ethel transfer to Olinda her 1/3 share in the joint tenancy in consideration of the transfer to her of the 1/3 share by Olinda. On registration, the former joint tenants were registered as tenants in common in equal shares.

**Held:** (Latham CJ) Alienation of his interest by a joint tenant to a stranger severs the joint tenancy. No transfer of an interest as a joint tenant so as to make the transferee a joint tenant with other joint tenants is possible when the transferee is a stranger to the joint tenancy. The transfer would destroy unity of time and unity of title. The question is whether such an alienation to another joint tenant is possible.

If there were three joint tenants A, B and C, and A transferred his interest to a stranger, D, then D would own a one-third interest as tenant in common with B and C, and B and C would hold a two-thirds interest as between themselves as joint tenants.

If there are three joint tenants, A, B and C, and one joint tenant A transfers his interest to another joint tenant B, the result is that A then has no interest in the land, B becomes a tenant in common as to one-third interest in the land, and remains a joint tenant with C as to a two-thirds interest.

In the present case, the transfer by A to B made B a tenant in common with C as to a one-third interest, leaving B and C as joint tenants in respect of a two-thirds interest. That joint tenancy of B and C was severed when B transferred his interest as joint tenant to A. If the document is so interpreted effect is given to the plain intention of the parties so that A, B and C became tenants in common of the land, each owning a one-third interest.

(b) **Alienation in equity**

A joint tenant's entry into a specifically enforceable contract to alienate in a way that would sever the joint tenancy at law<sup>7</sup> upon the alienation taking place, immediately severs the joint tenancy in equity

|   |   |
|---|---|
| <p>A + B<br/>↓<br/>C</p>  | <p>If A and B are joint tenants and A transfers her interest to C, severance occurs in equity</p> <p>For value: if specifically enforceable contract is in writing and signed (<i>Chan</i>)</p> <p>Gift: if <i>Corin v Patton</i> test is met (need transfer form and CT)<sup>8</sup></p> <ul style="list-style-type: none"> <li>At law, A and B remain joint tenants</li> <li>A and B hold on constructive trust for B and C as tenants in common in equal shares</li> </ul> |
| <p><b>Corin v Patton (1990) 92 ALR 1</b></p> <p><b>Facts:</b> a husband and wife owned Torrens title land, subject to a registered mortgage, as joint tenants. The wife attempted to sever the joint tenancy by signing a transfer of her share in the land in favour of her brother to be held on trust for her and her children. The transfer had not been registered and no steps had been taken to ensure that the mortgagee would produce the certificate of title at the Land Titles Office in order to enable the transfer to be registered.</p> <p><b>Held:</b> (Mason CJ and McHugh J) various ways in which a joint tenancy can be severed. The starting point is the judgment in <i>Williams v Hensman</i>... In the present case, the second and third of these means are clearly not relevant. But there is the question whether a unilateral declaration of intention or other act inconsistent with the continuation of a joint tenancy may suffice for the purposes of the first method of severance. The question was answered firmly in the negative.</p> <p>Unilateral action cannot destroy the unity of time, of possession or of interest unless the unity of title is also destroyed, and it can only destroy the unity of title if the title of the party acting unilaterally is transferred or otherwise dealt with or affected in a way which results in a change in the legal or equitable estates in the relevant property.</p> <p>Accordingly, it is necessary in this case for the appellants to demonstrate that Mrs Patton effectively alienated the property in equity.</p> <p>Enforcement of a transfer by way of intended gift when the donor has done all that was within his power to vest title to the property in trustees for the donee: as the transaction is complete as far as the donor is concerned, no question of withholding specific performance can arise and equity will hold the donor to the</p> |   |

<sup>7</sup> If A and B hold equitable interests as joint tenants, A severs the joint tenancy when A transfers her interest to C (in writing and signed: 23C(1)(c))

<sup>8</sup> With E-conveyancing, *Corin v Patton* may not have a role to play.