

Topic List:

Topic 1: Introduction and Fundamentals of Land Ownership → Pre-Midterm not included

Topic 2: Torrens Title (Indefeasibility & E-Conveyancing) → Pre-Midterm not included

Topic 3: Co-Ownership → **Page 2**

Topic 4: Easements and Profits à Prendre → **Page 20**

Topic 5: Covenants over Freehold Land → **Page 36**

Topic 6: Leases and Licences → **Page 48**

Topic 7: Mortgages → **Page 59**

Topic 3: Co-Ownership

Requirements for Creation of Co-Ownership

Tenancy in Common (TIC)

1. **Definition:** Exists where 2 or more people have an **UNDIVIDED** share (but DISTINCT) in the same parcel of land
 - (a) Interests are not identifiable in any physical sense
 - (b) **Undivided** = each tenant's share relates to the whole of the property
- 1.2 **Consequences upon death of 1 tenant:** No right of survivorship
 - (a) The interest of the dead person falls **into their estate** and can pass by will because tenant has a DISTINCT SHARE (but it's undivided)
 - (b) The share of the dead person does NOT pass to the survivor
- 1.3 **Requirements:**
 - (a) **Unity of possession (MUST HAVE)** → each tenant must be entitled to the rights/ownership of the **entire** land (subject to any K interest between them)
 - (i) Ex: If A owns ½ of the land, and B owns ½ of the land separately and these shares are divided and the parties don't have rights to the other person's land, then there is **NO CO-OWNERSHIP AT ALL** (either under JT or TIC)
 - (b) **Intention:** **Mischel Holdings**
 - (i) Express: Grantor **expressly says to be held as TIC** (and you have unity of possession)
 - (ii) Implied: Words of severance at the time of grant ('shares' in land)
 - A. If you talk about 'shares' in land, that shows you aren't creating a JT because there are only 'potential' shares in a JT, there are no actual shares

Joint-Tenancy (JT)

2. **Definition:** Exists where 2 or more people have an **UNDIVIDED** share (but **NOT DISTINCT**) in the same parcel of land
 - (a) **Meaning** → Each has a right to the whole property, but no individual right to any particular share
 - (b) Tenants only have a POTENTIAL share in the property, therefore **cannot** deal with share as strictly nothing to convey
- 2.2 **Fraud:**
 - (a) For the purposes of **indefeasibility**, the fraud of 1 JT does NOT infect the other's indefeasibility as **s.42 RPA** requires **PERSONAL DISHONESTY** (**Cassegrain**)
 - (i) **C.f:** Keane J dissenting in **Cassegrain**

- (ii) **C.f:** Windeyer J in **Diemasters**

2.3 **Consequences upon death of 1 tenant:** There is a right of survivorship

- (a) Interest (potential share) of the deceased JT is **extinguished** and the interest (potential share) of the surviving JT is correspondingly enlarged
- (b) Right of survivorship cannot be defeated by a JT leaving their interest by will to someone else → if it's JT, the potential share of the dead JT **extinguishes**

2.4 **Requirements:** Must have the 4 unities + Intention of right of survivorship

- (a) **Unity of Title** → All tenants must hold their interest under the SAME instrument (ex: one document)
 - (i) If arose out of physical possession (**s.23D(2)** lease) all tenants must go into possession at the same time
- (b) **Unity of Interest** → Each JT's interest in the property must be identical in **NED**
 - (i) **Nature:** Fee simple vs lease
 - (ii) **Extent:** Can't hold interest in $\frac{3}{4}$ and $\frac{1}{4}$ shares
 - (iii) **Duration:** Fee simple v life estate, despite both being freehold interests
- (c) **Unity of Possession** → Each tenant must be entitled to possession of the WHOLE property together with the other co-owners
- (d) **Unity of Time** → The interests of all JT's must **VEST** at the **SAME** time
 - (i) Normally satisfied when unity of title is satisfied
 - (ii) **Exceptions** → Wills and beneficial interests created under a trust
 - (iii) **Example:** I have big land and 4 kids. I create an instrument giving each of them $\frac{1}{4}$ interest when they turn 18 = the interests are vesting at DIFFERENT times = no JT
 - A. The above example would be a JT if the instrument = will or beneficial interest under a trust
- (e) **Intention of right of survivorship/to create a JT (see next page)** → if it's clear that the grantees aren't to have a right of survivorship between them (a JT), then even if you have the 4 unities, it **will NOT** create a JT

2.5 **Misc:**

- (a) **Corporations** → **s.25 CA** says that corporations can hold in joint-tenancy despite the fact that they cannot die
 - (i) Corporation death = dissolution date → increases share of other JT's
- (b) **Order of death** → **s.35 CA** says if JTs die together and impossible to determine order of death, deaths presumed to have occurred in order of seniority (oldest dying first)

Is it a TIC or JT? When the Grant is **SILENT** as to Intention – PRESUMPTIONS

*NB → It won't be a JT if you don't have the 4 unities, so once you have those, if the grant is silent as to the intention, this is what you apply

GL Presumptions - Traditional Approach (JT presumed unless equity kicks in)

3. **AT LAW:** (*Delehunt v Carmody*, 470)
 - 3.1 At CL there is a presumption in favour of **joint-tenancy**
 - 3.2 **Rebuttable** by:
 - (a) Absence of 1 of the 4 unities
 - (b) Words of severance (ex: in equal shares/divided equally)
 - (c) Clear intention to create a TIC
4. **In EQUITY:** (*Delehunt v Carmody*, 470-471)
 - 4.1 Equity will follow the law (JT) **except** in situations where it would be **UNCONSCIONABLE**, if deemed **unconscionable** then the land will be held as TIC in equity
 - 4.2 Equity regards **3 situations** to be UNCONSCIONABLE:
 - (a) Purchase money and incidental expenses provided in UNEQUAL shares
 - (i) Equity presumes that, despite holding the legal estate as JT, the parties hold the equitable interest as TIC in shares proportionate to their respective contributions
 - (ii) This is a resulting trust
 - (b) Advance of money on mortgage, whether equal or unequal (OS mortgages)
 - (i) Where 2 or more persons advance money to another party, and they get a mortgage in return, that mortgage is held as TIC
 - (c) Business Partners/Joint-Venturers contribute money towards acquiring land (equal or unequal amounts)
 - 4.3 **Weird Rule of *Ryan v Dries*:**
 - (a) If property conveyed to parties as JT expressly but the specified shares of the legal estate do not match the contributions to purchase price, equity will presume resulting trust in accordance with actual contributions

Statutory Presumptions - Current Approach (TIC presumed, unless s.26 doesn't apply)

CONVEYANCING ACT 1919 - SECT 26

Construction of conveyance etc of any property beneficially to two or more persons together
26 CONSTRUCTION OF CONVEYANCE ETC OF ANY PROPERTY BENEFICIALLY TO TWO OR MORE PERSONS TOGETHER

(1) In the construction of any instrument coming into operation after the commencement of this Act a disposition of the beneficial interest in any property whether with or without the legal estate to or for two or more persons together beneficially shall be deemed to be made to or for them as tenants in common, and not as joint tenants.

(2) This section **does not apply** to persons who by the terms or by the tenor of the instrument are executors, administrators, trustees, or mortgagees, nor in any case where the instrument expressly provides that persons are to take as joint tenants or tenant by entireties.

5.

6. **RULE:** CL presumption of JT (Delehunt v Carmody) **overturned** by s.26(1) CA in favour of TIC (applies to TT land)

- (a) Only applies in the '**construction of an instrument**' – **does NOT apply to oral dispositions**
- (b) Limited to a disposition to '**2 or more persons**'
- (c) Not limited to legal estates (**with or without the legal estate**) meaning if you receive land as beneficiary, s.26 will apply

7. **Non-Application of Rule:**

7.1 If s.26(1) does not apply because transfer is oral (not by instrument) or to a single person (not to 2+ persons like in Delehunt)....then

- (a) **Prima facie** → Apply the tradition GL approach per above, legal estate presumed JT and equitable TIC if it falls within 1 of 3 classes of exceptions
- (b) **However** → per Delehunt, courts will construe dispositions not strictly within s.26(1)'s terms, IN LINE with s.26(1) and therefore → oral dispositions are still presumed to be TIC at law
- (c) **Similarly** → even IF purchase price provided in EQUAL shares with transfer to a SINGLE person, in line with policy of s.26(1) it is to be treated as equitable TIC (Delehunt)
 - (i) This situation would **normally** be a JT because: (it's not though)
 - A. 1. S.26(1) wouldn't apply because transfer made to single person
 - B. 2. GL presumption would apply
 - C. 3. Equity **would NOT intervene** because the contribution to the purchase price was made in **EQUAL** amounts (**must be unequal for equity's intervention**), it's just the name of owner was different

(ii) Reasoning for modified approach in **Delehunt**:

- A. When a purchase is made in the name of 1 person (when 2 or more people contributed), and there is no presumption of advancement, the property will be held on resulting trust. If those contributions were unequal, the property **will be held on a resulting trust for the contributors as TIC in proportion to the amounts which each contributed** (**Calverly v Green**)
- 1) TIC applies because it's 1 of the 3 exceptions that apply under the equity exceptions
- B. What about as in **Delehunt** where it's the same facts as above, the only difference is that the purchase price was made in EQUAL shares. Will it still be TIC? Or the straightforward approach of GL meaning JT?
- C. If it's JT, Delehunt gets everything alone because when Mr Carmody died, if the presumption was one of JT, his interest is automatically extinguished and Delehunt would get everything
- D. However → TIC prevailed because:
- 1) **s.26(1)** didn't apply
- 2) **GL didn't apply either**, instead the statute **s.26(1)** is what equity now follows (rules of law in their CURRENT state)
- 3) Equity following **s.26(1)** would deem this situation to be one where equity's intervention is required because there is now a statutory preference for TIC

7.2 **Delehunt Matrix**:

- (a) Facts:
- (i) Carmody held legal title to land ALONE. He and his de-facto wife, Delehunt, had contributed EQUALLY to the purchase price. On Carmody's death, his estranged legal wife and Delehunt disputed how beneficial title to the land was held
- (b) Held:
- (i) **s.26** was not **DIRECTLY** relevant as the instrument conveyed title to one person only, but has the **INDIRECT** effect to show a legal preference for TIC (**equity follows the law as it is NOW**)

8. **s.26(2) Exceptions**: (there are 2)

8.1 **Express intention of JT** → "Instrument expressly provides persons are to take a JT" → then they take as JT

- (a) **Hircock v Windsor per Hope J**: Does not require words "joint-tenants" to be used or a specific formula in the lease, it was clear by the terms of the lease and the surrounding circumstances meant that there was a clear indication that the parties took as JT which was sufficient to engage the application of **s.26(2)**

- (b) **Step 1:** Look to the words
- (c) **Step 2:** Look to the circumstances, context and any difficulties that would arise from it NOT being a JT
 - (i) Imagine if GG dies and the person in his will moves in as lessee that would be absurd
- (d) **NB** → even if instrument expressly provides for JT, equity may still deem the beneficial interest to be held as TIC per traditional categories (*Minter v Minter*)
 - (i) How is this possible?
 - (ii) All that s.26(2) does is prevent the **AUTOMATIC DEEMING** of a TIC in the construction of an instrument...the effect of s.26(2) simply removes the automatic deeming found in s.26(1) but allows the rules that prevailed prior to the CA to continue to operate

8.2 Persons taking as executors, trustees, administrators, mortgagees

Application to TT land?

- 9. s.100 RPA
- 9.1 If parties are NOT registered as joint-proprietors, apply s.26. But being registered as “joint-proprietors” isn’t allowed under the RPA (the RG won’t register it)

Rights between Co-Owners (Applies to TT and OS Land)

Rights to Reimbursement for Improvements & Repairs:

10. **What are we talking about?** We are talking about the situation where 1 co-owner improves the land which increases the value of the land. Therefore, it unfairly improves the non-paying co-owners value of the land as well → try to seek compensation
11. **CL position** → co-owner who has improved/repaired property without ASSENT of other co-owner **has NO claim** to recover (*Leigh v Dickenson per Brett MR, 65*)
- (a) Nobody forced them to improve the land and therefore they can't recover
12. **Equity** → co-owner MAY be given credit for improvements/lasting repairs if other co-owner would benefit **unfairly** if no credit given
- 12.1 Timing:
- (a) The equity may only be asserted at termination of co-ownership when dividing proceeds of eventual sale of the property (*Brickwood v Young*) including:
- (i) **s.66G CA** proceedings and partitions (*Leigh v Dickenson*)
- A. This is a statutory right for a co-owner to bring proceedings in SC for an order that land be sold (adjustments for improvements are made here)
- (ii) Resumption by government (*Brickwood*)
- (iii) Private sale (*Callo v Rupvchev*)
- (iv) Declaration and termination of beneficial entitlement (*Ryan v Dries*)
- 12.2 Operation:
- (a) It operates as an **equitable charge** and runs with the land, so is possible to **enforce against other co-owner's successors** in title (*Brickwood*)
- (b) Torrens → the equitable charge is an unregistered interest, thus should caveat as if transferee becomes RP of the share on which it is charged it will be erased (*Squire v Rogers*) (Sam Hoare wtf)
- (c) Torrens → the equitable charge is an unregistered interest so can be extinguished under the indefeasibility doctrine
- 12.3 Claimable work: Can claim for improvements creating an equity which attaches to the land, the benefit of which will run with the land (*Brickwood*)
- (a) **Mortgage instalments** → payments increase the parties' equity in the property and hence amount of the proceeds distributable to them (*Re Gorman*)
- (i) A co-owner who pays a greater proportion of the mortgage instalments than reflects his proportionate share of the property is generally able to recover the overpayment from the other co-owners (equitable doctrine of contribution) (*Foregeard v Shanahan*) **which rejected the reasoning in Ryan v Dries** because your right comes from the law of debt, **NOT co-ownership**