

## Co-ownership at common law

– In the absence of contrary evidence, the common law will presume a joint tenancy. Where land was conveyed to 2 or more persons as co-owners they take interests as JT at law unless one of the four unities was absent or words of severance were used in the deed of conveyance.

- Courts require only a slight evidence of severance or an absence of one of the unities to determine that a JT is in fact a TIC, unity of possession attaches to both JT and TIC- but if one or more of the other unities are missing then their interests are as TIC, unless unity of possession was missing then they are no co-owners but instead separate owners.

- In general an indication of an intention to divide gleaned from either the words used or from the grant as a whole gave rise to a TIC.

- **Morley v Bird (1798) 30 ER 1192** – old case – English case on co-ownership, 2 parties (A and B, A is the will maker) A leaves property to B in his will with a condition that B pays a certain sum of money to the following 4 people (CDEF). A lives longer and the beneficiaries didn't live as long, F was the only person left living when A died (CDE all died). F argues I was a JT with CDE we were all JT of the entitlement of that whole payment, F says to B pay me the whole amount C+D+E+F. CDE had beneficiaries still alive, they were TIC therefore 25% to beneficiaries to C/D/E and F. Was F a JT with CDE or TIC, a TIC he would only get 25% as a JT he would get 100%.

HELD: F was a JT was entitled the whole money the estates of CDE got nothing. An absence of 'words of severance' are words that indicate an intention that parties hold individual undivided shares in the property.

4.3 **Words of severance** will indicate an intention to create undivided shares and will generally rebut the common law presumption of a joint tenancy. Examples – “to be divided between ...” “to my 3 sons equally” “to be divided between A and B” this GENERALLY rebuts the presumption.

- **Robertson v Fraser (1871) 6 Ch App 696**: quoting Lord Hatherly LC; “[A]nything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy and to create a tenancy in common...the word ‘participate’ is sufficient to indicate an intention to divide”

- Similarly – **Re Leaver [1997]** – the words “equally as a joint tenant” resulted in the creation of a TIC.

#### 4.4 The problem of contradictory words:

- **Re Barbour [1967] Qd R 10. – [12.130]** rebuttal of presumption of words of severance – farming property in QLD, leaves the farm in his will to his sister and 2 brothers – describes it as leaving to his siblings “to share and share alike as JT’s”. By the time he dies one of his brothers had already died. The brother who had died in his estate had 16 beneficiaries, he had failed to make a will – in QLD law when he died without a will then it passed to 16 beneficiaries. When the testator died what was the relationship between the brother 2 sisters and deceased brother, were they JT then the brother that died early gets nothing (his 16 beneficiaries gets nothing) but under TIC then the 3 siblings will include the 16 beneficiaries of the deceased brother. The wording to “share and share alike” those were words of severance indicated an intention to take undivided shares in the land. Nature of the land – farming land – was the intention to include the 16 beneficiaries who would have held a very small interest?

HELD: by looking at the circumstances the intention was to hold the land together through the surviving siblings and a JT NOT a TIC, words of severance must be looked at in their context.

- **Forbes v Git [1922] 1 AC 256** – the first words prevail in a deed but the last words in a will. (rule of law).

#### 4.5 The registration of co-owners of Torrens land:

- **section 60 TLA.** – 2 or more registered as co-owners then its presumed in the absence of stating otherwise then they hold JT.

- **Calverley v Green (1984) 155 CLR 242** – registration at law is not conclusive of equity. Can register as JT but can be found as TIC in equity.

4.6 Co-ownership in equity – Equity prefers to treat parties as TIC in relation to the beneficial estate because of the certainty and equity of a TIC. TIC in common law are presumed to be TIC in equity.

If JT at law can be shown to have an intention to hold beneficially, equity will treat them as TIC in 3 situations;

1. Unequal contribution to the purchase price
2. money advanced on a mortgage (whether equally or unequally) and
3. contributions of business partners.

- when equity intervenes and holds parties to be TIC despite their legal status as JT, it did so on the basis that the parties must be in some circumstances be presumed to have intentions to hold individual and separate shares. There must be evidence that the beneficiary TIC was rebutted.

(a) 1. Unequal contribution to the purchase price [12.145] (or assumption of joint liability under a mortgage) by co-owners; ie one party pays 60% one pays 40%.

- **Calverley v Green (1984) 155 CLR 242.**
- **Bull v Bull [1955] 1 Qb 234 – 6.16** - mother and son purchasing a house together, son paid most of the money. Son registered the title to the house in his sole name as sole owner. Both lived together. He was legal owner and was asked to leave – she objected she had made a partial contribution to the purchase price of the land. In equity, both are TIC in proportion to their contributions so the son could not evict the mother – she was a TIC and equally entitled to possession. HELD: sale of property by son was allowed with the amount held in trust for his mother.

Rebutting of presumption:

- **Goodman v Gallent [1986] 1 All ER 311.**
- **Vedojs v Public Trustee [1985] VR 569** – best case – unequal contribution made by husband and wife to purchase land. Question was would they be treated as TIC in equity? HELD: NO, equitable presumption was rebutted as husband and wife they would not have intended to hold undivided shares.
- But see now **s 79 Family Law Act 1975 (Cth)** overrides the common law and equitable rules as it's a Commonwealth Act.

Where parties contribute in equal shares to the purchase price:

- **Lake v Gibson (1729) 21 ER 1052** – equity follows the law.
2. money advanced on a mortgage, whether equally or unequally:
- **Morley v Bird (1798) 30 ER 1192** – “if two people join in lending money upon a mortgage. Equity says, it could not be the intention that the interest in that should survive. Though they take a joint security, each means to lend his own and take back his own.”
  - **Sections 67, 68 Property Law Act 1969.**