

CO-OWNERSHIP

CHARACTERISE THE CO-OWNERSHIP

JOINT TENANCY

Four Requirements: (Wright v Gibbons)

- **Possession** - right to possess + occupy the property (Thrift v Thrift)
 - Cant exclude another JT from the property
- **Interest** – all parties must have an equal potential share.
- **Title** – all interests must derive from the same title
- **Time** – all tenants must receive interest at the same time

Right of Survivorship: (Gould v Kemp)

- If one JT dies, their share enlarges the other JT's shares.
- If there is uncertainty as to who died first – apply s 35 Conveyancing Act
 - JT who is older is assumed to have died first, unless evidence of otherwise (Hickam v Pearcy)

TENANCY IN COMMON

- tenants have identifiable, proportional, fixed shares in the property
- only **unity of possession**
 - each co-owner has an equal right to enjoy possession of the entire property
 - no right to exclusive possession – can't exclude others from occupying the entire property
- right of survivorship does not apply
 - passed on through will or rules of intestacy.

CREATION OF THE CO-OWNERSHIP

AT LAW

- s 26(1) CA tenancy in common is **presumed** (Hircock v Windsor Home)
 - s 26(2) CA unless the instrument expressly states otherwise (Delhunt v Carmody)
- 4 unities must be present
 - no unit of possession = no co-ownership at all
 - no words of severance can be used
 - cant state that a co-owner is not entitled to the whole property but only a divided share

IN EQUITY

- TiC is presumed where: s 26(1) CA (Delehunt v Carmody)
 - Unequal contributions to the purchase price of a property
 - One co-owner advances money on a mortgage
 - Land is held in partnership and therefore constitutes an asset of the partnership
 - acquired by partnership or joint business venture is deemed to be held in equity under a TiC (Lake v Craddock)

Where the purchasers contribute unequal amounts

- co-owners that make unequal contributions to the purchase price hold as TiC in equity
 - unless there is evidence of contrary intention (Calverley v Green)
 - eg. married couple (Cummins v Cummins)
 - receive an equitable interest as TiC proportionate to their contribution
- where registered as JT, they are equitable tenants in common
 - eg. A and B buy a house together. A does all paperwork and on settlement, tenancy is registered as JT. as B contributed less, A and B are TiC and each hold an undivided share equal to their contribution.
 - At law → 50/50 split because the instrument says JT
 - At equity → title held in proportion to their contributions

Where co-owners advance money on a mortgage

- Where each advances money, in equal or unequal shares, equity will presume TiC
 - Equity assumes each has an interest in recouping the value of their individual investment ([Morley v Bird](#))
- **S 96A and 99 CA** – imply a joint account clause into mortgages
 - Doesn't convey the owners hold as JT but is for the purpose of if the other mortgagee dies, the remaining mortgagee does not get their loan back, they hold the repaid money on trust for the deceased mortgagee's estate

Where property is acquired by a partnership or joint business venture

- At Law → TiC unless instrument states JT
- At Equity → TiC in respect to their contributions

SEVERANCE

UNILATERAL SEVERANCE BY ONE JT

Transfer to 3rd party

- At Law:
 - Transferring legal interests (could be to another co-owner)
 - Effective upon registration: **s 42 RPA**
- At Equity:
 - Effective when JT entered into specifically enforceable contract to transfer their share
 - Original JT will hold legal title on trust for purchaser as a TiC ([Wright v Gibbons](#))
- By Gift:
 - Requires that the one is armed with everything necessary to affect the registration of the interest
 - Nothing less will suffice ([Corrin v Patton](#))
 - Refusal from solicitor, mortgagee, or JT to provide access to CT will prevent perfection of gift ([Costin v Costin](#))
 - BUT gift will be perfect in equity where the donor has executed a document that satisfied: **s23(1)(a) CA**

Transfer to self

- JT can register a transfer to themselves to sever a JT: **s 97 RPA**
 - Severance not achieved until actual registration ([Freed v Taffel](#))
- No need to produce CT, just need notice to all other tenants: **s 97(5) RPA, s 12(A)(2) and (3)**.

Declaration of Trust

- **S 23C(1)(b) CA** – person can declare by writing that they hold their interest on trust for another
 - Will sever the JT in equity

COURSE OF DEALINGS AMONG JT'S

- If conduct among JT's is 'sufficient to intimate that the interest of all were mutually treated as constituting a TiC' the JT will be severed ([Williams v Hensman](#))

LEASES / MORTGAGES

Lease

- Doesn't sever, just suspends.
 - Rights of survivorship are suspended until lease is concluded ([Frieze v Unger](#))

Mortgage

- mortgage operates as a charge, not a transfer ([Re Forest Trust v Anson](#))
- 4 unities remain intact and the JT is not severed
- mortgagee who only has an interest in the property held by one JT, runs risk that mortgagor will predecease other JTs.
 - Estate of a deceased JT retains no interest in the property by virtue of the right of survivorship ([Lyons v Lyons](#))

Severance by Merger

- JT is severed if one JT acquires further interest in the land
 - Eg. A holds property for life, with remainder to B and C as JT.
 - A transfers life interest to B – severs JT between B and C

SEVERANCE BY MUTUAL AGREEMENT

- JT is severed when all parties agree to take as TiC (*Lysaght v Edwards*)
 - All JT's transfer to themselves as TiC → converts JT to a TiC (*William v Hensman*) - S 45A CA and s 99 RPA
- Sufficient in writing or oral agreement: s 54 CA (*Burgess v Rawnsley*)

SEVERANCE BY UNLAWFUL KILLING

- Forfeiture Rule
 - Equity prevents one tenant from benefitting from causing the death of another (*Rasmanis v Jurewitsch*)
 - This applies regardless of the degree of culpability of the death-causing tenant
- S 5 Forfeiture Act 1995 - precludes someone from benefiting from their crime, unless the supreme court concludes that justice requires the forfeiture rule to be modified.

SEVERANCE BY BANKRUPTCY

- Results in involuntary alienation to the trustee
 - Law → severance effective only once trustee is registered – s 58(2) Bankruptcy Act 1966
 - Equity → severance is effective from the moment the declaration of bankruptcy is made (*Re Holland*)

TERMINATION

Co-ownership between joint tenants or tenants in common can be terminated in three ways:

1. **Sale / Partition** – to sell between parties (*Re Allingham*)
 - co-owners sell their co-owned property. JT is not severed until the proceeds of sale are received + distributed
 - most common remedy
2. **Resumption**– government may resume property for special purposes such as building a road, school etc.
 - Government will usually pay compensation
3. **Court Order**
 - Pursuant to s 66G Conveyancing Act 1919
 - S 66G empowers court to appoint trustees and vest property in them on either:
 - Statutory trust for sale
 - Statutory trust for partition
 - S 66F defines 'co-owner' as including a co-owner of a legal or an equitable interest or the mortgagee or incumbrance of a co-owners interest, whether legal or equitable.
 - A co-owner is entitled to obtain an order from the court for the sale or partition of the property
 - Partition: terminates co-ownership so that each owner becomes sole owner of parts of property
 - Courts discretion is limited with respect to making an order pursuant to S 66G (*Pannizotti v Trask*)
 - Where co-owners own less than ½ share, court must be satisfied that it is just in all circumstances to do so.

RIGHTS BETWEEN CO-OWNERS

RIGHT TO POSSESSION + OCCUPY

- Each co-owner has right to occupy the whole of the property (*Thrift v Thrift*)
- This right is granted to 3rd parties, but cannot include rights the co-owners didn't have (eg. right to exclude)
 - If lease is granted, lease cannot prevent other co-owner from enjoying possession (*Frieze v Unger*)
- **Excluded from Property** (*Wilkinson v Haygarth*)
 - Any co-owner excluded/ousted from property may sue in trespass or when a co-owner has damaged property
 - Excluded co-owner will be entitled to an occupation fee
- **Domestic violence** (*Dennis v McDonald*)
 - Co-owner leaves due to domestic violence – constitutes an exclusion

IMPROVEMENT AND REPAIRS

- no right at **common law** for a contribution to costs of improvement without specific agreement (*Leigh v Dickson*)
- in equity → may have a claim where other co-owners unfairly benefit from the improvements

- entitled to: (*Boulter v Boulter*)
 - actual amount spent on improvements
 - consequential increase in value of the land
- improvement requires more than mere repairs and maintenance
 - general maintenance and pest control are excluded
 - mortgage repayments + water council rates are included (*Foregard v Shanahan*)

RENTS AND PROFITS

- not available at common law → equity
- *Rent* →
 - Assumes that a co-owner who collect rent for the use of property does so for all other co-owners and will be liable to account (*Ryan v Dries*)
- Profits →
 - Account for profits where business is run on joint behalf, or directly derived from *property* (*Squire v Rogers*)

MORTGAGES

- Mortgagee: lender of \$ (eg. bank)
- Mortgagor: borrower of \$ (eg. landowner)

TYPE OF MORTGAGE

EQUITABLE MORTGAGE – unregistered

1. **In writing:** s 23C *Conveyancing Act*
 - Unregistered mortgages – equitable mortgages (*Barry v Heider*)
2. **Supported by sufficient acts of part performance** s 23E(d) CA
 - deposit of the title deeds as security for money advanced – eg. CT (*Cooney v Burns*)
 - deposit of folio
3. **Agreement to execute a mortgage**
 - Where money is agreed to be advanced under loan agreement to grant/accept mortgage, then an equitable interest arises (*ANZ v Widin*)

→ unregistered mortgages are governed by *conveyancing act*

LEGAL MORTGAGE - registered

- Mortgage involves the mortgagee registering a charge on the CT via execution and registration
 - Legal interest does not pass to the mortgagee until registration of the mortgage has occurred s 42 RPA
- **Requirements:**
 - Must be in the form of a deed: s 23B CA
 - Registered in an approved form s 56(1) RPA
 - Covenant by mortgagee to re-convey the property if amount outstanding is paid by stipulated date
 - Mortgagor retains equity of redemption which can also be assigned

TT Formalities under the RPA

- **S 56(1):** must execute the mortgage in the approved form (identify mortgagee, mortgagor and folio number)
 - **S 56(c):** confirmation of mortgagor's identity
- **S 57:** mortgagor remains RP - doesn't transfer any estate or interest in the land
- **S 58:** priorities of mortgages
 - Proceeds distributed in accordance with the order of registration
- **S 59:** registration of transfer by mortgagee –
- **S 60:** mortgagee is not entitled to the income or possession of the mortgaged property until the mortgagor's default

RIGHTS OF MORTGAGOR (BORROWER)

- Equity of redemption
- Title documents

