

Co-ownership

OS: Co-ownership is ownership of an interest in land by more than one person. There are two forms of co-ownership: joint tenancy (JT) and tenancy in common (TIC). JTs share the same interest in undivided shares. TIC share the same interest in distinct shares. It must firstly be established where X and Y were JT or TIC.

Steps:

1. Was it JT or TIC?
2. What is the position in equity?
3. Has the JT been severed?
4. Who should the money be divided between owners?
5. Who has an interest at law? Or in equity?

Step 1: Were they JT or TIC?

Step 2: if they are TIC what kind of proportions should they be?

JT

OS: JT exists between 2 or more people who own a single interest in property. JTs hold the whole property jointly and nothing separately. JTs are entitled to use, possession, and enjoyment of the land subject to the rights of the other JTs but at the same time has no right to any individual part. For there to be JT 4 unities must be present; Possession, interest, title, and time.

- Hold entire prop jointly and nothing separately – can't divide shares, must deal with all
- Features
 - o All unities must be present: possession, interest, title, time
 - o Rights of survivorship apply – TLA s 38(1) and (2)
 - o No words of severance
- 4 unities
 - o Possession: JT entitled to possession of the whole property
 - o Interest: each JT has an interest of the same nature, duration and extent
 - o Title: each has acquired title under the same instrument or act – most likely is the same conveyance
 - o Time: each interest vests at the same time and by virtue of the same event
 - o **EXCEPTION:** Trustee relationship – in a will, might give rise to a JT even when they weren't granted at the same time.

Survivorship

- **An interest of a JT cannot be part of his/her estate, but accrues to a surviving JT – JT cannot leave their interest to another person in their will unless they are the last owner.**

PLA s 184

Presumption of survivorship in regards to property

Where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority and accordingly the younger shall be deemed to have survived the elder.

Vedejs v Public Trustee [1985] VR 569 - JT in Law v Equity

FACTS:

- V lived with K (deceased) as his common law wife. The deceased had purchased a house in his name shortly after V and the deceased had decided to live together. V had contributed a portion of the deposit (\$1K). All domestic expenses, including payment of the loan (\$8K) were paid from pooled funds. The deceased died interstate, having no kin – question over division of assets.

HELD:

- At the time of acquisition, there was an implied common intention constructive trust so that V held jointly as JT not TIC
- JT in equity available
- Emphasis on timing – common ownership for the trust and benefit of the wife
- Giving effect to the intention of the parties – equity enforces
- At the time of the acquisition, there was an implied common intention that the property should be acquired on the joint behalf of the plaintiff and the deceased
- Accordingly, the deceased held the property on trust for himself and the plaintiff
- Once the parties are presumed to hold equally despite any inequality in their contributions, equity would presume a JT in the absence of a clear indication that a JT was not intended.

TIC

OS: unlike JT, TIC do have distinct shares in the property. These shares do not correspond to any physical division of the property. Furthermore, TIC may have all 4 unities present but it is only necessary to have unity of possession. Common law presumes that co-owners intended to hold as JT where 4 unities are present and no words of severance are used per TLA s 30(2) and 33(4) of the TLA.

Distinguishing features:

- no right of survivorship (can be passed down in will or leased part of it) – **interest CAN be transferred by will.**

Words of severance

- If an instrument that creates co-ownership uses 'words of severance' the parties will be tenants in common and not joint tenants
- Words of severance are words that indicate that the transferees have distinct shares:
 - Equally, between, in equal shares
 - The registrar produces guides that identify how property holdings can be described on instruments of transfer etc.

Presumed TIC except where:

- Make unequal contributions to the purchase price – *Calverley v Green*: HCA held that G&C held their joint legal interest on trust for themselves as TIC in equity in proportion to their respective contributions to the purchase price.
- Advance money as mortgagees (equally or not) – if there is more than one person that has lent money to the RP by way of mortgage.
- Acquire property for business venture as partners
- Flexible approach/ hold land for their separate business purposes

Malayan Credit v Jack Chia-MPH Ltd – Flexible Approach (point 4 of exceptions)

FACTS:

- Jack and Malayan Credit leased a property jointly from the lessor. Between themselves, paid rent according to proportion of floor space each occupied: Jack (38%) and M (62%). Prior to the grant of lease, M invoiced J in the same proportion for its share of the security deposit. Lease granted to M and J as JT

ISSUE:

- Were M and J beneficially entitled to a lease of a business premises as TIC in equal or unequal shares? – what was their manner of holding

HELD:

- First instance: shares unequal. Appeal: shares equal
- Privy Council: shares unequal. In the situations in which in the absence of express agreement equity could presume JT at law to be TIC in equity of the beneficial interest were not limited to a purchase of unequal shares, a loan on mortgage advanced unequally or partnership property but included leases taking a lease of premises for their own separate business purpose.
- PC allowed appeal – in the situations in which in the absence of express agreement equity could presume joint tenants at law to be tenants in common in equity of the beneficial interest were not limited to a purchase of unequal shares, a loan on mortgage advanced unequally or partnership property but included leases taking a lease of premises for their own separate business purpose
- Here, it could be inferred that since the commencement of the lease the parties held the beneficial interest as tenants in common in equity in the unequal shares of 3,614 to the D and 2,306 to the P.

Severance of JT

OS: severance is used to describe the means by which a JT is converted into a TIC. There are 3 main ways in which a JT can be severed and turned into a TIC: destruction of 4 unities, unilateral declaration or act by JT operating on his or her share, and mutual agreement among the tenants to sever.

Mischel Holdings v Mische – Mother and Son's company owned prop but she lived in it

FACTS:

- Before M's death, it was agreement the M would receive her share of the proceeds of the sale of the apartment free of any encumbrances created by the son's company on the title. M died before settlement of the sale of the apartment and the son's company went into liquidation. Liquidator sought the M's share of the proceeds of sale based upon survivorship as JT
- M's estate argued that the JT had been terminated in equity and the M's share of the sale proceeds should be distributed as if she was a TIC, according to her will.

HELD:

- Croft J: Sons company never had possession of the apartment that there was not the requisite unity of possession which was required to constitute JT
 - o Son's company never had the right to possession of the premises as it was an apartment for the mother to live in by herself
 - o An oral agreement to sever a JT will suffice and that equity regards the parties as TIC as soon as the agreement to sever is made, even though legal title remains in them as JT, and even though the agreement contemplates the occurrence of the future events
 - o Consideration for the agreement to sever can be said to be the relinquishment by each party of their interest as JT, including the right of survivorship
 - o JT was transformed into TIC immediately upon the marking of the agreement

- This agreement can also be supported by part performance and there can as a separate ground be severance of the JT by a course of conduct that constitutes a general dealing, sufficient to manifest the intention to divide the whole

Acts of severance – Unilateral Severance – Alienation

- To a stranger, each other or one's self
- PLA s 72(3): after the commencement of this Act a person may convey land to or vest land in himself

Wright v Gibbons

FACTS:

- 3 sisters were JT of property in Tasmania
- S1 purported to transfer to S2 her undivided interest in the land and B purported to transfer to S1 her undivided interest in the land to the intent that S1,2,3 should all three be TIC
- When 2 sisters who had transferred their interest later died, the remaining sister sought to invalidate this earlier presumption claiming that a JT had endured

HELD:

- Upon registration of transfer, the JT was severed and the 3 sisters became TIC – S3 not part of the severance

Acts of severance – Unilateral Severance - operation on own share

OS: Severance can occur by grant of proprietary interests in land, if granting the interest destroys one (or more) of the four unities.

NOTE: If one JT expresses an intention to sever the JT is that sufficient? Usually no, intention to sever isn't enough

Grants a mortgage: Lyons v Lyons [1967] VR 169

- Executor argued that widow and deceased's JT was severed during his lifetime by grant of mortgaged.

HELD:

- grant of mortgage did not sever JT
- While granting a general law mortgage by on JT to a 3P may sever a JT, granting a mortgage over Torrens Land is unlikely to sever JT

Grants a lease: Frieze v Unger

- J and H were registered as JT of a property. The property was initially leased to F's niece and her husband (oral agreement). When they moved out J moved in. J reached an agreement with the Unger's and their son to allow the U for the occupation of the property (licence) to board at the property

HELD:

- No grant of lease merely suspends a JT for the duration of the lease term. The revision expectant on the term will pass to the survivor of the JT so that any suspension or severance is such only as is necessary to accommodate the lessee's occupation under the agreement

Merger

- JT will be severed by merger when a JT acquires a further estate in the land subsequent to the creation of the JT and the estate is different to that already held

By agreement

- When JT enter into an enforceable contract to sell his interest, equity will deem as done which ought to be done and regard the purchaser as the owner of the interest in equity (Lysaught v Edwards)
- Cf with Tanwar v Cauchi – vendor under specifically enforceable contract of sale may not be a trustee for the purchaser. Therefore, entry into a contract of sale by one JT may not constitute alienation of an equitable interest.

Mutual agreement

- A JT can be severed by agreement between all co-owners – subject to statutory formalities

Abela v Public Trustee [1983] 1 NSWLR 308

FACTS:

- Husband and wife were JT of matrimonial home
- Separation, wife negotiated to sell the home and to divide the proceeds of sale equally between them
- Consent order made that the parties join in the sale of the home although the net proceeds of the sale were not to be released to the parties until further order
- H died and wife sought a declaration that as at the date of death H, the JT had not been severed.

ISSUE: when was the JT severed?

HELD:

- JT may be severed by an agreement evidencing that intention which need not specifically enforceable or even binding as a contract at law

- A subsequent repudiation of the agreement will not affect the operation of the severance, which is final and irrevocable at the time of the agreement
- Severance may also be effect by conduct of JT which shows a common intention that the JT shall be severed although not evidencing an agreement to sever
- In absence of agreement as to shares in which the JT should be split, W was entitled as TIC to ½ of the net proceeds of sale.

Public Trustee v Pfeifle [1991] 1 VR 19

FACTS:

- H and W were JT of property. After dissolution of their marriage, they entered into an agreement regarding their property claims. The parties' agreement that the properties would be sold upon (i) remarriage of either party (cl 6), or (ii) 3 years after the date of the agreement (sunset clause), or (iii) by mutual agreement (cl 8) and proceeds divided equally.

HELD:

- By agreement, parties displayed a common intention to sever JT – thus JT was severed immediately in equity by mutual agreement. However, severance at law does not occur until formalities are fulfilled.

Course of dealing

- Severance can occur without an express agreement where parties conduct their dealings on the assumption that they hold distinct shares
- Course of dealing must be engaged in by all JTs – just mutually treat themselves as TIC: proven as a question of fact, by person asserting severance has occurred.
- Physical division of property; mutual wills; execution of documents indicating common shares; sale of property where funds paid into separate bank accounts
- BUT negotiations or discussion alone are inadequate as evidence of course of dealing

Williams v Hensman

- Interested parties severed JT by their conduct
- In absence of mutual agreement or court order JT will be severed by common belief and act in a way that suggest that their interest are held in distinct shares
- Severance is a legal consequence of their action rather than a course of dealing being an indicator of their agreement

Mischel Holdings

- Forgiveness of debt but acted in a way that suggested shared ownership
- Acted as if they were TIC even though legally they were JT

Termination of Co-ownership (sale or division)

PLA s 225(1)	A co-owner of land or goods may apply to VCAT for an order or orders under this Division to be made in respect of that land or those goods
PLA s 225(2)(a)	An application can request the sale of land/goods and division of proceeds among co-owners
PLA s 225(2)(b)	An application can request physical division of land/goods among co-owners
PLA s 225(2)(c)	An application can request a combination of matters in (a) and (b)
PLA s 225(3)	A person who makes an application under ss 1 must give notice of the application to the holder of a security interest over the land or goods to which the application relates
PLA s 226	In addition to any other parties, all co-owners of the land or goods to which the proceeding relates are parties to a proceeding in VCAT under this Division
PLA s 227	Adjournment of hearings – spouses or domestic partners (1) VCAT may adjourn hearing before final order if co-owner has made application under Family Law Act
PLA s 228	VCAT can order a just and fair sale or division of land
PLA s 229	VCAT must take into account (a) that the land is being used for e.g. business or residential, (b) whether land is able to be divided and practicality of dividing, (c) particular links or attachments to the land e.g. unique or special value to one of the co-owners.
PLA s 230	VCAT may order (1) division of land (2) compensation to co-owner for differences in value
PLA s 231	VCAT may order appointment of trustees
PLA s 232	VCAT may order – (a) Land sold by private sale or auction (b) Co-owners may purchase land at auction (c) Fair market price determined by independent valuer (d) Set a reserve price (e) Independent valuation (f) Cost of sale be completed within specified time (g) Cost of sale be met (h) Sale or division to terms and conditions

	(i) Any necessary deed or instrument be executed and documents of title be produced to enable order to be carried out effectively (j) Direct Registrar of Titles to make amendments to Register
PLA s 233	Orders for compensation
Orders for Compensation PLA s 233	
<p>In general, VCAT can order that co-owners account, reimburse, or pay compensation to other co-owners due to a variety of circumstances, including:</p> <p>NOTE: 233(2) – taking into account; (2) In determining whether to make an order under subsection (1), VCAT must take into account the following—</p> <p>(a) any amount that a co-owner has reasonably spent in improving the land or goods;</p> <p>(b) any costs reasonably incurred by a co-owner in the maintenance or insurance of the land or goods;</p> <p>(c) the payment by a co-owner of more than that co-owner's proportionate share of rates (in the case of land), mortgage repayments, purchase money, instalments or other outgoings in respect of that land or goods for which all the co-owners are liable;</p> <p>(d) damage caused by the unreasonable use of the land or goods by a co-owner;</p> <p><u>(e) in the case of land, whether or not a co-owner who has occupied the land should pay an amount equivalent to rent to a co-owner who did not occupy the land; * (occupation rent)</u></p> <p>(f) in the case of goods, whether or not a co-owner who has used the goods should pay an amount equivalent to rent to a co-owner who did not use the goods.</p>	