

Topic 2: Co-Ownership

No matter how many co-owners there are to one property, they are all entitled to simultaneous possession of the entire estate in fee simple, and no co-owner can exclude another from possession regardless of the percentage of ownership.

1. CHARACTERISE THE RELATIONSHIP

Joint Tenancy

Joint tenants own the entire interest, subject to the rights of the other joint tenants – use the word POTENTIAL!

- Pursuant to s26(2) of the CA, the instrument explicitly states that it is a joint tenancy.

To have a valid joint tenancy, four unities must be fulfilled. They are as follows: unity of possession, unity of interest, unity of title and unity of time.

Unity of possession is the right of each tenant to enjoy possession of the entire interest, and no co-owner can lawfully exclude the other from occupation of the entire property. Unity of interest means that all joint tenants must hold the same type of interest. Finally, the unity of title means the interests of the joint tenants must be acquired by the same instrument and unity of time means that they must attain the interest at the same time through that instrument.

--- explain how all of these are fulfilled ---

As all of these are fulfilled, there will be a valid joint tenancy.

All joint tenants are afforded the right of survivorship which prevents the deceased owner leaving their interest to their estate: *Gould v Kemp* (1834). The right of survivorship means that the other joint tenants will absorb the deceased's interest.

Pursuant to s35 CA, if both joint tenants die at the same time, the interest goes to the younger person's estate.

Tenancy in Common

Under s26(1) CA, there is a statutory presumption in favour of a tenancy in common, which applies at law and equity. Unless otherwise expressly joint tenants stated in the instrument creating interest (26(2)), there is a presumed tenancy in common. However, this will not apply if the parties have unequal shares: *Minter v Minter* (2000)

2. CREATION

Presumptions at law indicate that when constructing an instrument which creates a co-ownership relationship, it should be presumed that the co-owners hold a tenancy in common.

Otherwise, a tenancy in common can be indicated by the fact that the four unities are not present, words of severance (equally, A and B in equal share, to be divided between) or otherwise evincing the intention through circumstances: *Surtees v Surtees* (1871).

Equity is the same as equity follows the law. As such, the only exception is s26(2).

A tenancy in common will still be presumed at equity in three scenarios:

- Co-owners contribute different amounts to the price: in proportion to how much they contribute to the purchase price: *Calverly v Green*
 - Exceptions: if it can be established on the facts that the parties intended to be JTs (e.g. parties are married usually assumed intend to be JTs): *Cummins v Cummins* 2006
 - Where registered as JT, they are equitable tenants in common
- Co-owners advance money on a mortgage
 - Where the joint interest is a mortgage, the two mortgagees who hold that interest will always be TIC because they have a right to their own security
 - Where each advances money in equal or unequal shares, equity will presume because equity assumes each has an interest in recouping value of individual investment: *Morley v Bird*
 - Ss96A and 99 CA can imply a joint account clause into mortgages – doesn't convey owners as JT but is for the purpose of if other mortgagee dies, remaining mortgagee does not get loan back but holds money on trust for deceased estate
- Partnership/Joint business venture
 - Even if they register as JTs they are TIC because it is for a commercial enterprise and they do not afford the right of survivorship so both can pass property in a will

A joint tenancy will be converted into a tenancy in common where: *Wright v Gibbons*

- A joint tenant transfers their interest
- A joint tenant mortgages their interest
- A joint tenant leases their interest
- The joint tenants agree to convert
- A merger takes place
- A joint tenant unlawfully kills another joint tenant
- There is a transfer by one joint tenant

These above actions destroy one or more of the 4 entities, thereby ending the right of survivorship.

3. SEVERANCE

Unilateral Severance by One JT

Alienation to Third Party:

Upon registration, alienation of an interest will be effective at law and a legal estate transferred pursuant to s42 RPA.

In equity, alienation is effective where there is part performance or where a joint tenant entered into an enforceable, written agreement to transfer the interest to a third party.

- A result of this is that the original joint tenant will hold legal title on trust for the purchaser as a tenant in common: *Wright v Gibbons* (1949)

Real Property Exam Scaffolds

For the interest to be validly transferred as a gift, the donor must have done everything necessary for them to attain a legal interest: *Corin v Patton*

A gift will be perfect in equity where a donor has executed a signed document satisfying the requirement in s23C(1)(a) CA

However, the refusal of any party (solicitor/mortgagee or co-joint tenant) to provide access to the CoT will prevent perfection of the gift in equity: *Costin v Costin* (1997)

Alienation to Self:

Pursuant to s97 RPA, a joint tenant may transfer to themselves to create a tenancy in common without a certificate of title. S97(2) notes that a joint tenant severing their joint tenancy interest must provide to the Registrar General the names and addresses of JT's or evidence of efforts made to locate their addresses, and a statement that persons is not aware of any limitation on their capacity to sever the JT. Under s97(5), the Registrar General must notify the other joint tenants.

A transfer is only legally effective on registration: *Freed v Taffel* (1984)

Declaration of a Trust:

Pursuant to s23C(1)(b) CA, in order to make a declaration of trust of any interest in land, it must be in writing and signed by the JT

Mutual Agreement Among JTs

If the JTs agree to hold their interests as TiC, the joint tenancy is severed in equity: *Lysaght v Edwards*. If the agreement meets the requirements of s54A CA as it is in writing and signed by the party or supported by acts of part performance: *Lyons v Lyons*, there will be severance.

Even if the agreement is repudiated, severance is irrevocable.

For matrimonial homes and agreements, a joint tenancy severed upon agreement to sell is concluded but the right of survivorship is available until the Family Court makes an order: *Slater v Slater* (1987)

An agreement to make mutual wills results in severance: *Re Wilfords Estate* (1934)

Course of Dealing Among JTs

If conduct among JTs is sufficient to intimate that the interests of all were mutually treated as constituting a TiC, the JT will be severed: *Williams v Hensman*

If a joint tenant mortgagor dies before the mortgage is discharged, the right of survivorship takes precedence and the mortgagee will cease to be encumbered by the mortgage: *Lyons v Lyons* (1967).

If a joint tenant leases their interest, it suspends the joint tenancy but does not sever it. If the joint tenant dies while the tenancy is suspended, the interest goes back to the other tenants after the lease is over. Where the co-owned property is a lease, the sublease by one co-owner will sever the joint tenancy for the entire lease: *Frieze v Ungar*

The JT is severed if one JT acquires further interest in the land by way of a merger.

Severance by Mutual Agreement

The JT is severed when all parties agree to take as TiC: *Lysaght v Edwards*, in which case, all JTs transfer to themselves as Tic: *William v Hensman*, s45A CA and s99 RPA.

It will be sufficient in writing or as an oral agreement: *Burgess v Rawnsley*

Severance by Unlawful Killing

Equity prevents one tenant from benefitting from causing the death of another: *Rasmanis v Jurewitsch*, and this applies regardless of the degree of culpability of the death-causing tenant. Pursuant to s5 *Forfeiture Act 1995*, someone is precluded from benefiting from their crime unless the Supreme Court rules that justice requires the forfeiture rule to be modified.

Severance by Bankruptcy

Bankruptcy will result in an involuntary alienation to the trustee. At law, severance is effective only once the trustee is registered: s58(2) *Bankruptcy Act 1966*, and in equity severance is effective from the moment the declaration of bankruptcy is made: *Re Holland*.

4. TERMINATION

Co-ownership relationships between JTs and TiCs can be terminated in three ways:

- a. Sale/partition – to sell between parties:

When co-owners sell their co-owned property, the JT will be severed only once the proceeds of the sale are received and distributed: *Re Allingham*

- b. Resumption:

A co-ownership relationship may be terminated by the government when resuming property for special purposes such as building a road or public infrastructure, and in this case the government will generally pay compensation

- c. Court Order:

Pursuant to s66G CA, the court is empowered to appoint trustees and vest property in them on either a statutory trust for sale or a statutory trust for partition. Further, s66F defines ‘co-owner’ as including a co-owner of a legal or equitable interest or the mortgagee or encumbrance of a co-owner’s 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, and a partition will terminate co-ownership so that each owner becomes the sole owner of part of the property.

The court's discretion is limited with respect to making an order pursuant to s66G: *Pannizotti v Trask*. Where co-owners own less than ½ share, the court must be satisfied that it is just in all circumstances to do so.

5. RIGHTS BETWEEN CO-OWNERS

Right to Possession and Occupation

Each co-owner has the right to occupy the whole of the property: *Thrift v Thrift*. This right is granted to third parties but cannot include rights the co-owners did not have (e.g. if a lease is granted, the lease cannot prevent another co-owner from enjoying possession: *Frieze v Ungar*).

Any co-owner excluded from the property may bring an action in trespass or when a co-owner has damaged the property: *Wilkinson v Haygarth*.

- The excluded co-owner will be entitled to an occupation fee

Per *Dennis v McDonald*, if a co-owner leaves due to a domestic violence situation this constitutes exclusion.

When a co-owner leaves due to domestic violence this will constitute an ouster, but it is not an ouster where one party is subject to an apprehended violence order as the application for the order is not legally wrongful: *Biviano v Natoli*

Improvements and Repair

At common law, there is no right to guarantee a contribution towards the costs of improvement without a specific agreement: *Leigh v Dickson*.

However, in equity there may be a claim where other co-owners have unfairly benefitted from the improvements. Per *Boulter v Boulter*, they may be entitled to the actual amount spent on improvements and the consequential increase in the value of the land. Further, improvement requires more than mere repairs and maintenance and general maintenance and pest control are excluded, however mortgage repayments and water and council rates are included: *Foregard v Shanahan*.

Insurance premiums are also excluded: *Boulter v Boulter*

Rents and Profits

These are unavailable at common law but available in equity. For rent, it is assumed that a co-owner who collects rent for the use of the property does so for all other co-owners and will be liable to account: *Ryan v Dries*. They must also account for profits where business is run on a joint behalf or directly derived from the property: *Squire v Rogers*

Right to an Occupation Fee

Each co-owner is entitled to occupy the premises and as such each is not able to charge the other a fee.

Unless: *Wilkinson v Haygarth*

- One co-owner ousts the other
- There is an agreement to pay an occupation rent
- Where the occupying co-owner is claiming an allowance for improvements to the property
- Where the relationship between co-owners breaks down and each can't remain in the property

Cases:

Delehunt v Carmody (1986)

Facts:

- D and C contributed equally to the deposit and purchase price of property
 - Carmody on CT as RP → only 1 legal owner
- Oral agreement to hold equal shares + put property in both names.
- However, there was no indication of co-ownership (no instrument stating whether TIC or JT)
- C died without a will
- Property went to Mrs C (ex-wife) who ordered D to vacate.
- D argued joint tenancy as they equally contributed to the purchase price
 - Right of survivorship – she should hold the entire beneficial interest

Decision:

- Question: Did C and D hold the property as joint tenants (JT) or tenants in common (TIC)?
- Gibbs CJ: Equity presumes JT if there is an equal contribution to purchase price of property
- When there is no co-ownership, only one legal owner, equity imposes a resulting trust when someone else has contributed to purchase price
 - Property is legally owned by C, but D contributed to price – resulting trust arose and D was equitable joint tenant
- However, s26 CA applies to legal and equitable interests
 - Operates indirectly by overturning the common law presumption of JT
 - General rule – equity follows the law.

Held:

- Despite beneficial presumption of JT, as there was no instrument stating JT, TIC is assumed.

Corin v Patton (1990)

Facts:

- Mr P and Mrs P were registered joint tenants
- Mrs P fell ill and decided to sever the JT, transferring her beneficial interest to her brother
- Her solicitor drew up the relevant paperwork and Mrs P signed the transfer deed
 - Mrs P passed away before being able to procure the CT

Real Property Exam Scaffolds

- Memorandum and transfer remained unregistered

Decision:

- Question: Whether Mrs P successfully transferred the property, severing the JT and defeating Mr P right of survivorship?
- Statement of intention to transfer is not sufficient
- May acquire an equitable interest – however equity will not perfect an imperfect gift.
- Ms Patton had not done all that was necessary to effect the transfer
 - Failed to lodge the memorandum and request a duplicate CT
 - Did not tell the bank (mortgagee) she was transferring the property or request a duplicate to allow C to lodge documents at the Lands Title Office

Held:

- Ms P failed to transfer in equity.

Ryan v Dries [2002]

Facts:

- R and D bought a house together in unequal shares – R paying more
- R lived there full-time and D lived there on weekends with him
- R paid the majority of duties and costs + repaid the entire loan
- Relationship broke down – R changed locks, excluding D from property.
 - D wanted occupation rent (compensation for not living on the property)

Decision:

- Anything which increases the value of the property (including repairs) merits allowance
 - Rejects distinction between mere repairs and improvements (*Forgeard v Shanahan*)
- Claims for joint debt – if the claimant seeks equity then the claimant must do equity.
- As Ryan was seeking in equity, that Dries pay his portion of the ‘improvements’ that R had been paying
 - I.e. The duties, costs + loan
- R must do in equity – occupation rent was due to counter the allowances for the mortgage payments etc.