LAW5018 ADVANCED PROPERTY
EXAM NOTES

Contents

CO-OWNERSHIP

The issue is what interest [party] has in [property] at law and in equity.

1. At law

1.1 Joint tenancy (JT)

Two or more persons named in any instrument as taking any interest or estate in land, and/or who are registered as joint proprietors, are presumed to be joint tenants (JTs) (s33(4), 30(2)).

Apply: As [2+ persons] are [joint proprietors/jointly named], they are presumed to be JTs at law.

These presumptions are subject to the four unities and words of severance.

- Non-issue: there is nothing in the facts to suggest the 4 unities of possession, interest, title and time aren't present and no words were used to indicate an intention of distinct shares.
    - E.g. parties inherited property at the same time.
- Issue: go to four unities and severance below.

Four unities

Unity of possession	Each co-owner is entitled, concurrently with the other co-owners, to possession of the whole of the land.
Unity of interest	The interest of each JT must be the same in nature, extent and duration.
Unity of title	Unity of title exists if all JTs derive their interests from the same document or the same act.
Unity of time	The interests vested at the same time.

Words of severance

A JT won't be created if the instrument that creates the co-ownership uses words of severance to indicate an intention of distinct shares.

Words of severance:

- equally
- between
- among
- in equal shares
- between A and B
- to A and B respectively
- to A and B to share and share alike

1.2 Tenancy in common (TIC)

Created through express words to that effect, using words of severance, or the absence of either the unity of time, title or interest.

A TIC has unity of possession. Other unities and right of survivorship are not required (but other unities may be present).

1.3 Sole ownership

E.g. registered proprietor.

2. In equity

(JT at law)

If there is a JT at law, a JT in equity is presumed unless there is a reason to diverge.

As relevant:

There are four scenarios where a JT at law will be presumed to be a TIC in equity (Malayan Credit v Jack Chia).

1. First, a resulting trust arising from unequal contributions to the purchase price. [Apply].
2. Second, advance money as mortgagees (equally or not). [Apply].
3. Third, acquiring a property for a business venture as partners (Malayan Credit scenario). [Apply].
4. Fourth, holding land for separate business purposes/flexible approach [Apply].

These can be rebutted by evidence of intention to be JTs.

Factors indicating TIC in equity:

- Lease served separate commercial interests of both parties (Malayan Credit)
- Parties agreed what space they would occupy (Malayan Credit)
- Rent, deposit, stamp duty divided in unequal shares in accordance with areas they occupied (Malayan Credit).

Factors indicating JT in equity: see Vedejs factors below.

[Analyse intention of JT or TIC].

Malayan Credit v Jack Chia: MC and JC took a lease (no words of severance) of a floor of a building and agreed that they would occupy floor space and share costs in different proportions: 62% (Malayan Credit) and 38% (Jack Chia). They went into occupation of the allocated areas and were separately invoiced by the landlord for their respective proportions of rents and charges. **Held: At law:** JTs; they had all 4 unities and no words of severance. **In equity:** TICs; they were holding interests for separate business purposes

(TIC at law)

As there is no JT at law, equity will presume a TIC.

(Sole ownership at law)

Sole ownerships at law can still have co-ownership in equity as JT or TIC (Vedejs). Equity prefers a TIC.

Factors indicating JT in equity:

- House acquired for purpose of living together as a couple (Vedjes)
- Both contributed to purchase (Vedjes)
- Unequal contributions only reflected disparity in financial resources rather than arm's length transaction (Vedjes)
- Income pooled to pay off mortgage, joint purchase of household items, jointly improved house (Vedjes)

Factors indicating TIC in equity: see Malayan Credit factors above.

[Analyse intention of JT or TIC].

Vedejs v Public Trustee: V lived with de facto partner in house. He died. House was purchased in his name. V claimed he held house on trust for them both as joint tenants. **Held: At law:** sole ownership by man. **In equity:** JT as there was no intention that they be treated as TIC. Upon man's death, woman became sole owner.

3. Was the JT severed?

[Party] will seek to show the JT was severed during the joint tenant's lifetime, preventing the operation of the right of survivorship. Severance converts a JT into a TIC. Each joint tenant is conceived as entitled to dispose of an aliquot share (Wright).

3.1 Unilaterally

A joint tenancy may be severed by an act of any one of the persons interested operating upon his own share may create a severance as to that share (Williams).

<u>Alienation by one JT</u>

E.g. JT sells their share to a stranger, another JT, themselves (s72(3) PLA).

At law: change in registered interest = severs.

In equity: specifically enforceable contract of sale= severs.

<u>Co-owner operating on their own share</u>

Mortgages: A mortgage of Torrens system land by a joint tenant does not itself sever the joint tenancy (Lyons).

Leases: A grant of a lease by a joint tenant of a fee simple interest does not sever the joint tenancy, but suspends it during the lease period, as unity of possession is affected (Frieze).

<u>Merger</u>

The unity of interest will be broken if one JT acquires a further interest in the subject property.

E.g. A and B are tenants for life, and then A acquires the fee simple remainder. No unity of interest between A and B.

3.2 Severance by Agreement

A joint tenancy may be severed by mutual agreement (Williams).

At law: need change in registered interest.

In equity: can sever through agreement without agreement having to be registered. Don't have to have a formally executed written contract for severance by agreement (Abela). A mutual agreement will show a common intention to sever a JT immediately (Pfeiffle - analogise).

Public Trustee v Pfeiffle: Parties were joint RPs of 2 properties. After dissolution of their marriage, they entered into an agreement approved by Family Court to sell properties and divide proceeds, based on certain events occurring. **Held**: This agreement showed a common intention to sever the joint tenancy at the time of agreement – not the time the events occurred.

3.3 Course of Dealing

A joint tenancy may be severed by the conduct of **all parties** indicating they view the shares as distinct (Wiliams; Mischel).

Factors indicating severance by course of dealing:

- Separate accounting records (Mischel)
- Separate tax declarations (Mischel)
- Borrowing money and declaring 50% ownership (Mischel)
- Mortgage repayments by one party were based on the notion that each had distinct shares (Mischel)

At law: not severance.

In equity: severance.

3.4 By Operation of Law

- **Bankruptcy**: JT severed if one party is bankrupt (Bankruptcy Act)
- **Homicide**: joint tenant who has committed crime wrongfully cannot profit from crime, so JT is severed (Rasmanis)
- **Court order**

3.5 Unilateral intention

In Victoria, unilateral intention is not sufficient to sever a joint tenancy.

E.g. written statement saying you don't want to be JT anymore.

3.6 Conclusion

Likely there was/wasn't severance at law/in equity.

As there was likely severance at law/in equity, each co-owner takes a proportional share of the JT as TICs.

4. Consequences

JT: survivorship

As the parties at JTs [at law/in equity], if one of them dies, their interest accrues to the other joint tenant/s. The survivor can lodge a form with the Registrar to register the interest accruing to the remaining joint tenants (s50 TLA).

As relevant: Where two or more persons have died in circumstances rendering it uncertain which survived, such deaths shall be presumed to have occurred in order of seniority and the younger is deemed to have survived the elder (s184 PLA).

[Party] would have 100% interest and [party] would have 0% interest.

TIC: no survivorship

As the parties are TIC [at law/in equity], the rules of survivorship do not apply. X's TIC share passes [to their estate, as per their will etc].

Assuming a 50/50 TIC, [party] would have 50% interest and [party] would have 50% interest.