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3. ASPECTS OF CO-OWNERSHIP; RIGHTS OF CO-OWNERS; SEVERANCE; SALE AND PARTITION

Reading: Butt, Chapter 14; and for specific topics as listed below: via Reserve search

3.1. TYPES OF CO-OWNERSHIP

3.1.1. Introduction

Butt [1401]

Four types of co-ownership

Joint tenancy – 2 or more persons, single owner of property, on death it goes to the other joint tenant (right of survivorship)

Tenancy in Common – no automatic right of survivorship; property can be passed in the will when one tenant dies, each tenant owns a separate share.

Co-passenary – no longer Butt [14109]

Tenancy by entireties – no longer Butt [14110]

In this course, the joint tenancy and tenancy in common will be our main focus. The other two forms have ceased to exist in NSW.

Historical background and development

The bias of the law used to be in favour of joint tenancies. This may go back to feudal times, when joint tenancies were common so that when one person working on the land, the interest vested on the remaining members so that the feudal structure would remain unaffected.

There was a presumption that when land was conveyed to two or more people jointly, they took as joint tenants. The presumption was dislodged if one of four unities was missing, words of severance were employed, or a joint tenancy could not have been intended from the words of the grant.

Words of severance: scrutinise to determine whether parties genuinely held as joint tenants. For example, phrases such as “equal shares”, “divided between them”, “distributed amongst them in joint and equal portions”, “share and share alike” indicated that a tenancy in common was created.

Equity took a different approach, finding in favour of tenancies in common in particular circumstances. This derived from concern for fairness amongst the parties. In such situations, the Court of Chancery would almost automatically hold that there was a tenancy in common (even though at common law it was regarded as a joint tenancy).

Equity would compel the parties who were joint tenants at law to hold the property on trust for themselves as **tenants in equity** where:

- The purchase money was provided in unequal shares – regarded as tenants in common as to their respected portions of input to the purchase. [Where persons provided equal shares, the normal presumption of joint tenancy followed.]
- Two or more people advance money on a mortgage. Presumption of tenancy in common in proportion of the amounts respectively advanced.

- Joint venture or partnership assets: Where persons acquired land as part of their business or undertaking, even where they contributed in equal parts for an interest in law. No right of survivorship applies, equity would compel the surviving partner to hold the property on trust for beneficiaries of the deceased's will.

You would require strong evidence to overthrow the strong presumptions set out immediately above.

The bias of the equitable approach has won out.

Present position – s.26 Conveyancing Act:

Construction of any instrument, land/property owned between 2 or more persons beneficially shall be held as TIC not JT

Joint Tenancy vs Tenancy in Common

Carmody v Della Hunt [1986] CLR

- Potential problem of co-ownership
- **Facts:** A and B each contributed equally to purchase of a house. House was registered in A's name only and a resulting trust arose in favour of B for half the share.
- **Issue:** Did A and B hold the land in equity as joint tenants?
- **Held:** under accepted doctrine in equity they held as JT's because in this situation equity followed the law. In this case since they contributed equally, under standard legal doctrine, they ought to hold under both law and equity as JT. But NSWCA held that notwithstanding s.26 did not expressly cover the matter, A and B should hold in equity as TIC in equal shares. This approach was upheld by the HC which held that although s.26 had no direct application to the facts of the case nevertheless it had an indirect effect to require that a resulting trust would arise in favour of A and B and create the same kind of interest as would have arisen if the land had been conveyed to both of them holding them as TIC in equal shares.
- **Proposition:** even in cases where there was no 'instrument' and where the position in equity would not apply, s.26 creates a presumption of TIC

3.1.2. Joint Tenancy

4 unities

- Unity of possession
- Unit of interest
- Unity of title
- Unity of time

Bias towards JT at law but the view of equity finding certain situations where JT would not be presumed where purchase money provided in unequal shares, loan provided on mortgage and partnership assets in contention

Exception – grants of estates made in a will - *McGregor v McGregor* (1859) 1 De GF & J 63

Right of survivorship

Butt [14-10]

The right of survivorship means that on the death of a tenant, the remaining joint tenant or tenants receive an estate that is no longer encumbered by the interest of the deceased.

What if the co-owners die at the same time? *Conveyancing Act 1919 s 35*

Conveyancing Act 1919

s35 Presumption of survivorship

In all cases where two or more persons have died under circumstances rendering it uncertain which of them survived, the deaths shall for all purposes affecting the title to any property be presumed to have taken place in order of seniority, and the younger be deemed to have survived the elder.

Corporate Joint tenants – *Conveyancing Act 1919 s 25(1)*

CA - s25 Power for corporations to hold property as joint tenants

(1) A body corporate shall be capable of acquiring and holding any property in joint tenancy in the same manner as if it were an individual, and where a body corporate and an individual or two or more bodies corporate become entitled to any property under circumstances or by virtue of any instrument which would, if the body corporate had been an individual, have created a joint tenancy they shall be entitled to the property as joint tenants:

Provided that the acquisition and holding of property by a body corporate in joint tenancy shall be subject to the like conditions and restrictions as attach to the acquisition and holding of property by a body corporate in severalty.

(2) Where a body corporate is a joint tenant of any property, then on its dissolution the property shall devolve on the other joint tenant.

3.1.3. Tenancy in Common

Butt [1402]-[1403]

Do not need to conform to four unities criteria. The tenants in common hold in undivided in shares. When the tenant in common dies, his interest will pass under a will, which is not available to joint tenants.

★ Only need unity of possession for TIC

1. The tenants hold in undivided shares, sometimes referred to as an 'aliquot' portion.
2. There is no right of survivorship.
3. Unity of possession.

In particular, the unity of interest may be absent and the tenants in common may hold in unequal interests but they are nevertheless entitled to possession.

3.2. CREATION OF CO-OWNERSHIP

Conveyancing Act 1919 (NSW) s 26

Real Property Act 1900 (NSW) s 100

Delehunt v Carmody (1986) 161 CLR 464

Butt [1414]-[1424]

Common Law

Butt [1414]

Under the common law, where property was devised or granted to two or more persons, the law would presume that the intention was to create a joint tenancy – *Campbell v Campbell* (1792) 4 Bro CC 15.

The presumption would apply unless:

- One or more of the joint unities was absent;
- The grant contained words of severance;

Nature of the grant

Equity

Butt [1416]

Despite the position at law which was to presume a joint tenancy, equity favoured tenancies in common on the presumption that persons would generally prefer to keep their own share of property and devise it to their heirs.

Wherever parties were tenants in common of the legal interest, they were presumed to be tenants in common of the equitable (beneficial) interest. There were also three situations where equity held that parties who were joint tenants of the legal estate were tenants in common of the beneficial interest:

- Purchase money provided in unequal shares
- Advance of money on mortgage
- Joint venture or partnership assets – where people contributed monies towards acquiring land as a part of that business venture, equity presumed a tenancy in common in shares proportionate to their contribution

The effect of s26 *Conveyancing Act*

Butt: [1417]-[1422]

CONVEYANCING ACT 1919

s 26 Construction of conveyance etc of any property beneficially to two or more persons together

(1) In the construction of any instrument coming into operation after the commencement of this Act a disposition of the beneficial interest in any property whether with or without the legal estate to or for two or more persons together beneficially shall be deemed to be made to or for them as tenants in common, and not as joint tenants.

(2) This section does not apply to persons who by the terms or by the tenor of the instrument are executors, administrators, trustees, or mortgagees, nor in any case where the instrument expressly provides that persons are to take as joint tenants or tenant by entireties.

- Reverses the common law bias towards joint tenancy.
- **Section 26(1)** adopts the equitable rule of leaning in favour of tenants in common. It provides that a conveyance, transfer, or devise of land to two or more persons creates a tenancy in common – unless one of the exceptions in s 26(2) applies.
- s 26 applies to instruments. If there is a written instrument, s 26 will apply, and if there is no written instrument you must apply the old common law and equitable approaches.

- Note *Delehunt v Carmody* (1986) (originating in the NSW CA to the HCA), where notwithstanding the literal limitation in s26, the HCA and NSWCA preferred a bias in general principle as well as through the legislation in favour of tenancies in common. Here the passing of legislation had an impact on the old doctrine as well.

How can we reconcile s100(1) of the Real Property Act with s 26 of the Conveyancing Act 1919?

RP Act - s 100(1)

Two or more persons who may be registered as joint proprietors of an estate or interest [in Torrens title land] shall be deemed to be entitled to the same as joint tenants.

- Section 6 CA – RP Act prevails
- RP Act provision appears to fly in the face of s26, but it would be rare to make use of s100.
 - o On a transfer, co-owners must select whether they want to be registered as joint tenants or tenants in common, meaning that when the document is registered, their interest will be also registered.
 - It is likely that if the parties fail to make the selection, the Registry would go back to them and require them to make a choice. **Butt [1422]**
- Butt:
 - o RP Act only affects registered status; not equity
 - o No such thing as a 'joint proprietor' in the RP Act or in the Register?

What is the situation when a party takes a beneficial interest without an 'instrument' coming into operation? ***Delehunt v Carmody (1986) 161 CLR 464***

- Even where there is no written instrument to which s 26 would apply, the courts will lean in favour to tenancies in common unless there is a true specification by the parties to the contrary.

A and B each contributed equally to the purchase of a house, but the house was registered in A's name only. A resulting trust arose in favour of B for a half share.

Question: *Did A and B hold as joint tenants?*

It was arguable that in equity they held as joint tenants too, because in the exceptional situations that had been carved out by the Court of Chancery, equity would follow the law because the parties had contributed equally.

NSWCA: notwithstanding that s26 didn't expressly cover the matter, A and B should hold in equity as tenants in common in equal shares.

HCA: upheld NSWCA decision. Although s 26 had no direct application to the facts, it had an indirect effect to require that a purchase price resulting trust for A and B and create the same kind of interest that would have been created if the land had been simply conveyed to both A and B (to which s26 would have applied).

3.3. RIGHTS BETWEEN CO-OWNERS

Butt [1425]-[1454]

Three historic areas of contention:

- improvements,
- occupation fees, and

- a right to an account of rent/profits that are in some way linked to the property.

The general approach will often be that you don't finalise these matters until the co-ownership is brought to an end.

3.3.1. Improvements made by one co-owner

Butt [1426]-[1434]

One co-owner cannot take active proceedings against another co-owner for recompense for improvements/repairs carried out on the authority

In practical terms, this means that a co-owner should approach other co-owners prior to expending money on improvements/repairs

Resumptions and partitions

Where the property was subject to a partition suit or resumed by local authorities, the co-ownership is brought to an end.

Leigh v Dickeson (1884) 15 QBD 60

- **General rule:** one joint owner couldn't take active proceedings for compensation for improvements he carried out on the property.
 - During that period, a co-owner was not entitled unilaterally to make improvements or repairs and then charge the co-owner with part/whole of the cost without having requested and obtained the consent of the co-owner.
- **Exception to general approach:** where the court held that there was in process a partition suit in equity. If you're in the process of bringing the co-ownership to an end, it might be appropriate to take improvements in consideration where there has been an appreciation of the property and the property is sold by decree by the court exercising equitable jurisdiction. i.e. one party can't benefit from the improvements without paying compensation for the work/money put in.

Facts: Plaintiffs as trustees owing 3/4's as TIC and defendant purchases other 1/4 as TIC. Defendant remained as lease – leasing remaining 3/4s of property. When P sued for arrears in rent, he claimed payment from them of a much large amount than he had expended in repairs and improvements. These repairs and improvements had not been requested by the plaintiffs

Held: although P's entitled to recover rent from D occupying house exclusively under terms of a lease and not as his character as TIC, D was not entitled to recover the costs of the repairs

Brett MR: improvements and repairs were voluntary payments by the D partly for the benefit of himself and partly for the benefit of his co-owners. The co-owner cannot reject the repairs and if he were liable for a proportionate share of the costs the D would get the advantage of the repairs without granting the co-owner the liberty of deciding whether he/she should adopt or refuse them.

Judges recognise that eventually there would need to be a day of reckoning – a partition suit in equity (breaking up of the land of co-owners). In this case the costs incurred would need to be shared by the co-owners as the co-owners would benefit from the increased purchase price of the property

Brickwood v Young (1905) 2 CLR 387

Facts: Improvements made by a previous co-owner (in a tenancy in common), before his share of the property was acquired by the present co-owner.¹ The land was then resumed by a public authority, and the owner of the share sought an allowance for the improvements made by his predecessor in title.

Held: Mr. Brickwood was entitled to be paid equal to ¾'s of the value of the land attributable to the improvements but this had to be set-off against the rents and improvements he had received from the property.

Griffith CJ: no active right to claim compensation for improvements. But an allowance could be made for the improvements where there is a partition suit, resumption, administrative suit, or the proceeds of sale are being split up.

- Improvements made by previous owner created an equitable right analogous to an equitable charge.
 - o The right to claim against co-owners is not merely personal to the individual co-owner who makes and pays for the improvements – it gives rise to an equity attaching to the land analogous to an equitable charge that is enforceable only in the event of a partition or distribution of the benefit of the land amongst the co-owners. The equity passes with the land and can be asserted by the possessor for the time being, who can claim the benefit of the improvement effected by his/her predecessor in title.
 - o Thus value of improvements made by previous co-owner is extended to the purchaser of the co-owned share, which included in the price the value of the improvements, so that he could stand in the position of the previous co-owner.
- Two points to note:
 - o The general common law priority principles apply
 - o Liability or obligation to distribute rents: the successor had agreed to set off rents/profits received by him from the property.
 - In the absence of an agreement to the contrary, rents and profits can only be set-off only so far as they exhaust the value of the charge for improvements. There had been no obligation to account for rents and profits beyond that.
 - Question of liability did not strictly arise

Dixon: no active right to claim compensation for repairs, but might be claimed in a suit for partition.

Commentary

- If you have OST, it is a pre-existing equity/charge in the land in favour of the owner or successor in title. If another co-owner sells his interest to a stranger who takes his share as a bona fide purchaser for value without notice, then because he took without notice of the equity he/she will not be bound by that charge.
 - o E.g. suppose you have A and B where A effects improvements. B sells his interest in the land to C and C is unaware had made these improvements w/o contribution from B and independently of B.
 - o The equity will be lost if the other co-owner takes his interest for value and without notice [*Brutash v Lunsdan* [1956] Canada SC] - C would take his/her interest free of any obligation for a reckoning if the co-ownership between C and A came to an end whether by partition or by sale.
- If you have Torrens title land, and the other co-owner sells his share and the purchaser is registered (with or without notice), the equitable interest is defeated [*Squire v Rogers* (1979)].

¹ Person had ¼ share of property as TIC and he transferred his share to Mr. Porter who built a house on the land and improved it but was still only a ¼ owner. He took the extraordinary step of building a house on the property – a significant improvement. Mr. Porter then sold his share of the land to Mr. Brickwood who took a ¼ TIC share in the land. The land was then resumed by a public authority and Mr. Brickwood claimed that he was entitled to ¼ of the resumption value as well as ¾'s of the increased land value attributable to the improvements made by his predecessors