Falcon Chambers

# Co-Ownership post-LPA: Home and Away

## Introduction

The Law of Property Act 1925 revolutionised what we can own, but also how we can own it. In sections 1 and 4, the list of property interests was (at least in theory) closed. As part of that exercise, the list of estates in land was reduced to fee simples and terms of years, and tenures limited to freehold and leasehold. This piece considers the limits placed on the forms of co-ownership permitted by the LPA, and considers an important legal divergence between jurisdictions that did, and those that did not, follow suit.

## Legal Tenancies in Common

Prior to the 1925 Act, a variety of forms of legal co-ownership were possible. The legal joint tenancy, whereby co-owners each owned the whole of the land, remains with us. Under a legal joint tenancy, each co-owner owns everything at the same time. This means that when one dies, the rest of the co-owners simply became the owners of the whole automatically, by operation of what we call survivorship. But it was also possible, pre-LPA, to own land as legal tenants in common, whereby each co-owner had their own separate interest in the land in question, in the form of what was confusingly called an "undivided share". It was as if each owner owned a piece of one jigsaw puzzle comprising the legal title. Each piece was capable of individual transfer. A good legal title depended on assembling the whole of the jigsaw. Such an arrangement could be entered into from the start, or a legal joint tenancy could decay into one by "severance" – whereby the joint legal interest was shattered into the legal jigsaw.

The 1925 legislation was seeking to streamline the transfer of land; it was no longer to be regarded as an inalienable family heirloom, suspended in a web of trusts and settlements. It was instead looking more like a tradeable asset.[1] The legal tenancy in common presented an obvious problem. The efficient sale of land would not be facilitated by a mode of co-ownership that required the buyer to go on a quest for fragments of title. The legal joint tenancy fitted the bill much better. There was only ever a single, unitary title to deal with. For this reason, the

[1] See A. Offer, Property and Politics 1870 -1914 (CUP, 1981), for a discussion of the social and political forces that shaped law reform proposals that ultimately led to the "codifications" of 1925. The legal forces at work are set out in J.S. Anderson, Lawyers and the Making of English Land Law 1832-1940, (OUP, 1992). Ultimately, the desire to modernise in 1922-25 appears to have been driven by a post-World War I desire to put the nation's social life back in order.

legal tenancy in common was abolished by section 34(1) of the LPA. All grants were to be treated as grants to joint tenants, and then only (to make things even easier) to the first four named transferees (section 34(2)). For good measure, the legal joint tenancy became unseverable: section 36.

Tenancies in common could henceforth exist in equity only, under a trust existing behind the legal joint tenancy. Purchasers would only have to deal with the trustees of the jointly owned legal title. Any fragmentary mess of ownership at the equitable level did not concern them if they operated the overreaching provisions under section 2. It was then for the vendor-trustees to distribute the purchase price to the beneficiaries in accordance with their fragments.

The resultant trust device that was introduced in all forms of co-ownership has however led to a divergence between those jurisdictions that have adopted the LPA, or something like it, and those that have not (the latter being the case in the vast majority of Commonwealth jurisdictions excluding Belize).

First, legal tenancies in common persist in those jurisdictions. A graphic factual example of the problems this creates can be found in Bannerman Town, Millars and John Millars Eleuthera Association v Eleuthera Properties Ltd [2018] UKPC 28, concerning land which was purportedly left to the freed slaves of a plantation owner on the island of Eleuthera. The land became valuable. A development company seeking to piece together legal title travelled far and wide to collect 133 conveyances of known fragments of title. Those efforts were in vain, however – the underlying root of those fragments was a void will. The conveyancing inefficiency of the legal tenancy in common in the Commonwealth in part explains the existence of and need for the statutory "quieting of title" jurisdiction, under which parties can apply for a determination that they have title, following an (unusually for common law jurisdictions) inquisitorial judicial process (explained in Bannerman at paragraphs 19 ff).

Secondly, those jurisdictions which have not abolished the legal tenancy in common do not require the creation of a trust in all cases of co-ownership. In many cases there won't be one unless for some reason the parties' legal arrangements do not reflect their equitable ones. This leads to a difference in the operation of adverse possession.

Under the LPA, all co-ownership must now be under a trust. Statute provides that trustees cannot dispossess their beneficiaries: Limitation Act 1980, section 21(1)(b). Adverse possession no longer therefore operates as between trustees and beneficiaries.

The position in the Commonwealth is different. As noted above, there often will not be a trust structure. Further, many jurisdictions retain some version of the Real Property Limitation Act 1833, section 12. That states that any co-owner, whether joint or in common, who enjoys the whole of the land jointly owned on their own account, or (presumably in the case of a tenant in common only) enjoys more than their share permits, is deemed to be in possession on their own account. In *Paradise Beach v Price-Robinson* [1968] A.C. 1072, the Privy Council explained that this meant that in jurisdictions which operated under that statutory provision, it was perfectly possible for one co-owner to be in adverse possession against the others. This was even the case where the co-ownership was in the form of a joint tenancy. It might be thought that, as a matter of general law, even the entire use of the land might be referable to the joint tenant's interest in the whole, but that argument is precluded by the words of section 12. Even that use is treated as in excess of the permitted use, and hence adverse.[2]

This, perhaps unjust, outcome is further compounded by the fact that those jurisdictions that still have section 12 do not have the inevitable trust that arises in any co-ownership situation in England and Wales after the LPA. This is graphically demonstrated by *Wills v. Wills (Jamaica)* [2004] 1 P & CR 37. The parties' marriage broke down, and the husband remained in possession of the family home and the wife never set foot in it again. They were legal joint tenants. Jamaica's version of section 12 is to be found in section 14 of the Jamaican Limitation of Actions Act 1881. The Board found (contrary to the Courts below) that section 14 compelled a finding that the wife's interest was time barred by adverse possession. The position would, the Board noted, have been different in England.[3] The laws of England and Jamaica had diverged, with the former, via the LPA, adopting the co-ownership trust. Had the case arisen in England, the wife would have had the unanswerable defence that her former husband was not a co-owner squatter, but her co-owner trustee in whose favour time could never run.

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[2] An application of Scrutton L.J.'s observation that use in excess of a permission is a trespass: "when you invite a person into your house to use the staircase you do not invite him to slide down the banisters": *The Calgarth* [1926] P. 93, 110

[3] At paragraph 16.