Private Client eBriefing

Co-ownership in the business context: the odiousness of survivorship in equity

Article by John Grocott-Barrett, 27th June 2024

1. The co-ownership of property is a question that vexes all private client lawyers. The recent judgment of Nugee LJ, a former member of these chambers, in *Williams v Williams* [2024] EWCA Civ 42 involved litigation that touched upon the issue in the context of partnership and real property.

2. *Williams v Williams* concerned a farming partnership and the ownership of various farms as between Mr and Mrs Williams and one of their sons (Dorian). The various transactions in question are detailed at length in the judgment, but at first instance it was determined that the key farm in question (Cefn Coed Farm) was not partnership property.[1]

3. The sole question on appeal was whether Cefn Coed Farm was purchased by Dorian and his parents as tenants in common (as held at first instance) or whether it was held by them jointly in law and in equity (as contended by Dorian).

4. The importance for Dorian is that if Cefn Coed Farm had been subject to a joint tenancy in law and in equity, then the law of survivorship would apply and his interest in the farm would be increased.

5. *Williams v Williams* is noteworthy for its clear statement that where assets have been purchased for business purposes, the Court will readily assume that survivorship, and hence joint tenancy, was not intended and presume that the co-venturers hold the assets as beneficial tenants in common.

[1] Dorian had contended that Cefn Coed Farm was a partnership asset and had "enured" to him alone after the deaths of his parents by the right of survivorship. Even had the farm been a partnership asset, it is difficult to see that his claim in that regard could have succeeded in circumstances where the deed of partnership provided that profits and losses should be divided and borne between his parents and himself in equal one-third shares (being language which is inconsistent with a joint tenancy).

Discussion

6. Although readers will be aware of the difference between joint tenancies and tenancies in common, accurately describing the quasi-Trinitarian features of joint tenancies is more of a challenge. For present purposes, it suffices to note:

    a. No joint tenant owns any distinct share in the property, but each has the potential share equal in size to that of the others. Tenants in common have shares in the property which can be unequal.

    b. Joint tenancies are subject to the law of survivorship; tenancies in common are not. On the death of one joint tenant, their interest ceases to exist: a joint tenancy cannot pass under the will or intestacy of a joint tenant, but instead with their notional interest passes to the other joint tenants by the right of survivorship.

    c. By various methods, a joint tenancy can be "severed" and the effect of doing so is to convert the joint tenancy into a tenancy in common. Generally, the effect of severance is that the former joint tenants obtain equal undivided shares in the property in question.

    d. In England and Wales (see sections 34 and 36 of the Law of Property Act 1925), it is impossible to hold real property as tenants in common at law, and all real property with more than one registered proprietor is held by joint tenancy at law. However, the position is different in equity, in that the property may be held either by joint tenancy and tenancies in common (the joint tenants at law holding the property on trust for the tenants in common, who may include persons other than the registered proprietors). By section 1 of the Trusts of Land and Appointment of Trustees Act 1996, co-owned land is held on a trust of land.

7. The nub of *Williams v Williams* was how land is held beneficially when it has been conveyed or transferred into joint names without any express declaration of trust.

8. Leave for appeal was granted in *Williams v Williams* in the light of certain dicta in the seminal House of Lords and Supreme Court decisions in *Stack v Dowden* [2007] UKHL 17 and reiterated in *Jones v Kernott* [2011] UKSC 53. In those cases it was remarked that if joint transferees do not expressly declare what the beneficial ownership is to be, then equity follows the law and the onus is on the person seeking to show that the beneficial ownership is different from the legal ownership, and that it was arguable that the first instance judge had begun from the wrong starting point.

9. However, both of these cases concerned the question of the respective beneficial interests of an unmarried couple in a house which they bought as their home. There was no question of the application of the law of survivorship, and the key question was how to quantify the parties' beneficial interests (i.e. what share to give them). Indeed, Nugee LJ observed at [47]-[50]:

    a. It is not possible in English law for more than one person to hold the legal title to land, except as joint tenants, all joint owners must hold the land on trust. In a joint names case (absent an express declaration of trust), the question is therefore "what are the trusts to be deduced in the circumstances".

    b. In most of these cases there is no dispute as to the identity of the beneficiaries, or that the legal owners are also the beneficial owners: the dispute was whether the property was held equally or in some other proportions, and how that was to be decided.

    c. In *Williams v Williams*, it was common ground that the parties were intended to be equal co-owners, the only issue being whether that took the form of a joint tenancy or a tenancy in common. The issue for practical purposes was whether the right of survivorship applied: this is not the issue in most cases of the *Stack v Dowden* type.

10. In that context, the comments in *Stack v Dowden* and *Jones v Kernott* did not displace the *"very longstanding and well established principle that equity will usually assume that co-owners acquiring property for business purposes do not intend survivorship"* ([58]).

11. Indeed, Nugee LJ (at [59]-[60]):

    a. Quoted from Megarry & Wade (9th edn) that it is a maxim of that "Equity leans against joint tenants and favours tenancies in common", preferring the certainty and equality of a tenancy in common to the chance of "all or nothing" which arises from the right of survivorship.

    b. Remarked upon the case of *R v Williams* (1735) Bunb 342 where it was said that *"Survivorship is looked upon as odious in equity"*.

    c. Referred to partnership cases dating back to 1611 expressing the rule in Latin, which can be translated as *"the right of survivorship has no place among merchants"*.

12. In that context, he concluded at [62]-[63] that notwithstanding the principle that the onus is on the person seeking to show that the beneficial ownership is different

from the legal ownership, where such property is acquired for business purposes, the court will readily assume that survivorship, and hence joint tenancy was not intended. Therefore, in the case of land bought for business purposes, the inference that equity follows the law is one that is easily and normally displaced by the presumption that such property is intended to be held in common.

13. Accordingly, the Court of Appeal dismissed Dorian's appeal.

Further considerations

14. The judgment in *Williams v Williams* makes determining the nature of property ownership in the business context somewhat easier. Much of this law will apply equally to question of determining the nature of partnership property or assets which have been bequeathed in a will, as it does to real property.

15. It is of course better where properly advised parties have made express and clear declarations as to their intentions. However, even if the parties make clear that they do intend to hold as joint tenants, that it is not the end of the matter, as is evident from the ability to sever.

16. I recently acted in a case where a box had been ticked on a transfer form indicating that the property was held as joint tenants both in equity and law. However, the property in question was used to generate income as a buy-to-let, the rents were divided equally by the co-owners and the co-owners referred to their interests in the property as being "shares" expressed in percentages. After the passing of the deceased, the co-owner who handled the rents continue to pay the share to the executors of the estate until she appears to have been advised otherwise.

17. Absent a rectification claim, the property could not be said to have initially been held as anything other than a joint tenancy both at law and in equity. However, the judge was persuaded that there was a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common, such that there was severance by conduct and no right of survivorship applied.

18. Although subject to an application for permission to appeal, that case is in line with cases of severance in the context of partnerships and estates: see *Jackson v Jackson* (1804) 9 Ves Jun 591 on the division of partnership profits and *Re Denny* (1947) 177 LT 291 (Ch) on the distributions made to three residuary legatees (who died following the death of the testatrix, after receipts being given but prior to all distributions being made).

19. Parties who survive their co-owners, at least in the commercial context, cannot therefore rub their hands in glee at the windfall they think they will receive, and lawyers acting for them must be aware that the Courts consistently lean against

joint tenancies. The right of survivorship is considered “odious” by judges who are likely to do their best to find a route to declaring tenancies in common.

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