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DEVELOPMENTS IN THE LAW OF CO-OWNERSHIP

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This article discusses recent developments in the law of co-ownership in Singapore, especially in relation to the doctrine of severance. In particular, the amendments to the law of co-ownership introduced by the Land Titles (Amendment) Act 2001 are considered. While the legislation appears at first sight to effect only technical amendments to the law, it has in fact made a significant change to the law of severance.

I. THE NEW LAW

As its title perhaps suggests, the Land Titles (Amendment) Act 2001[1] appears at first sight to be a piece of highly technical legislation of interest only to lawyers with active conveyancing practices. Indeed, the main purpose of the Act is to facilitate the conversion of unregistered land to the Torrens system.[2] As a result, it is hardly surprising that little attention has been paid to a provision that may well effect a significant change in one of the basic concepts of Singapore land law—the law of co-ownership.

Lost in the interstices of the Act is the following:

> Amendment of section 53:
> 16. Section 53 of the principal Act is amended —
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> (a) by inserting, immediately after the words "Tenants in common" in the 1st line of subsection (3), the words "entitled in equal shares";
> (b) by deleting subsection (6) and substituting the following subsection:
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> "(6) Upon the registration of the instrument of declaration which has been duly served as required by subsection (5), the respective registered estates and interests in the registered land shall be held by the declarant as tenant in common with the remaining joint

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1 No. 25 of 2001.

2 For a discussion of the Act as a whole see Tan, "The Land Titles (Amendment) Act 2001" [2001] S.J.L.S. 248.

> tenants and shares in the registered land shall be equally apportioned by the Registrar among the declarant and the remaining joint tenants."; and
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> (c) by inserting, immediately after subsection (7), the following subsection:
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> "(8) Where an application to register an instrument of declaration is made under this section, the Registrar may dispense with production of the document of title on such terms as the Registrar may think fit and register the instrument if he is satisfied that the applicant is unable to produce the document of title on the basis that he is unable to procure it despite his best efforts.".

Somewhat surprisingly, these highly technical provisions may well have effected an important change in the Singapore law of co-ownership. To appreciate this, it is necessary to return to a problem highlighted by the case of *Diaz v. Diaz*.[3] This relates to the procedure for severing a joint tenancy of registered land. Section 53 of the Land Titles Act[4] provides:

> (5) Without prejudice to any rule or principle of law relating to severance of a joint tenancy, any joint tenant may sever a joint tenancy of an estate or interest in registered land by an instrument of declaration in the approved form and by serving a copy of the instrument of declaration personally or by registered post on the other joint tenants.

Subsection (6) of section 53 as amended has already been quoted above.

The Act clearly envisages a two-stage process. The first stage is for the joint tenant who desires to sever the joint tenancy to serve an instrument of declaration on his fellow joint tenant. The second stage is the registration of the instrument of declaration. The use in subsection (5) of the language "any joint tenant may sever a joint tenancy … by an instrument of declaration … and by serving a copy … on the other joint tenants" might be understood as suggesting that severance is effected merely by serving a copy of the instrument on the other joint tenant. However, the phrase "[u]pon the registration" in subsection (6) seems to make it clear that severance only takes place upon registration.[5]

There is a clear contrast between the two-stage procedure provided for registered land and the simpler procedure which prevails in unregistered land. Here the joint tenant who wishes to sever only needs to serve a deed of declaration on his fellow joint tenants:

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3 [1998] 1 S.L.R. 361 [*Diaz*].

4 Cap. 157, 1994 Rev. Ed. Sing. [*Land Titles Act*].

5 This phrase also appeared in the subsection as it stood before the 2001 amendments.

> Upon the making of the deed of declaration and the service of the deed of declaration … the respective estates and interests in the land shall be held by the declarant as tenant in common with the remaining joint tenants ….[6]

II. *Diaz v. Diaz*[7]

In *Diaz v. Diaz*, Theresa Diaz and her elder daughter purchased registered land as joint tenants in 1989. In 1994, Mrs. Diaz signed an instrument of declaration in the approved form under section 53(5) of the Land Titles Act before a commissioner of oaths and shortly afterwards a copy was served on the elder daughter by registered post. For some unknown reason, however, the instrument was not registered pursuant to section 53(6). Mrs. Diaz made a will in 1995 in which she appointed her younger daughter as sole executrix and left her entire estate to her. Mrs. Diaz died in 1996. The question arose, therefore, whether the joint tenancy had been severed by the unregistered instrument of declaration—with the result that the younger daughter would be entitled to a half share in the property—or whether the entire property now belonged to the elder daughter under the doctrine of survivorship. To prevent a possible sale the younger daughter lodged a caveat against the property and the elder daughter brought an action to remove the caveat.

The Court of Appeal decided, affirming the judgment of C.R. Rajah J.C., that once a copy of the declaration is served under section 53(5) the joint tenancy is severed as between the joint tenants. However, until registration, the severance of the joint tenancy affects only the co-owners themselves and third parties are entitled to treat the joint tenancy as subsisting. Once the declaration is registered, the severance is completed in the sense that the tenants hold the land as tenants in common on the register and third parties are bound by this.

There are considerable difficulties with this approach. It introduces into Singapore law a new concept—that of a form of severance that operates only between the parties and which does not bind third parties. The law of co-ownership is already sufficiently complicated. The new doctrine risks adding further confusion.

Novelty alone, however, is not a sufficient reason to reject new law. A more serious objection is that the new doctrine may not in fact serve the purpose for which it was created. The matter came to court on an application to remove the caveat lodged by the younger daughter, who was the executrix

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6 *Conveyancing and Law of Property Act* (Cap. 61, 1994 Rev. Ed. Sing.), s. 66A(2), as amended by the Land Titles Amendment Act 2001, *supra* note 1.

7 *Diaz*, *supra* note 3. The case has been discussed previously by the present writer in Crown, "Severance of a Joint Tenancy" [1998] S.J.L.S. 166.

of the estate. The application was dismissed both at first instance and on appeal. However, according to the judgment, the estate of the deceased co-owner has only a personal claim against the survivor prior to registration, although as against the world the survivor is the sole owner of the property. In other words, the estate of the deceased co-owner has no interest in the property at this stage. If so, it would appear that the estate cannot lodge a caveat against the property. Section 115 of the Land Titles Act allows any person claiming an interest in land to lodge a caveat against that land. Section 4 of the Act defines "interest" as "any interest in land recognised as such by law" and the personal claim of the estate of the deceased co-owner does not fall within this definition.[8]

The new doctrine has roots neither at common law nor in equity. It is clear that it was developed by the court by way of statutory interpretation. Although there is nothing in the clear wording of the Act to suggest the introduction of a form of severance which operates only *inter partes*, the idea was clearly adopted to serve the purpose of the legislation. As Thean J.A. (delivering the judgment of the court) said:

> It seems to us that the purpose of sub-ss (5) and (6) of s 53 of the Act is to enable a joint tenant to have 'full dispositive power' and to sever the joint tenancy without obtaining the consent of the other joint tenants. If, as the appellant contends, only upon registration of the instrument of declaration under s 53(6) would the severance of the joint tenancy become effective, such purpose would not be achieved in some situations. The procedure of registration of the instrument under s 53(6) necessarily involves an endorsement of the severance or words to that effect on the register of title and in turn a similar endorsement on the duplicate certificate of title. Hence, to register the instrument the duplicate certificate of title must be produced and presented at the Registry of Titles. If the duplicate certificate of title is in the possession of one of the other joint tenants or other person, say a mortgagee, who refuses to release it, the declarant would not be able to proceed with the registration. In such a situation notwithstanding the fact that he has complied with s 53(5), he would still be unable to sever the joint tenancy. Thus, the purpose of sub-ss (5) and (6) of s 53 would be frustrated. In our view, this cannot be the intention of the legislature. Plainly, the purpose of these provisions is to provide a co-owner a simpler way of severing the joint tenancy without having to obtain the consent of the other party which sometimes may or would not be feasible.[9]

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8 *Cf. Commissioner of Stamp Duties (Queensland) v. Livingstone* [1965] A.C. 694. For a more detailed discussion of this point, see Crown, *supra* note 7 at 169.

9 *Diaz*, *supra* note 3 at 370.

One can readily appreciate the force of this reasoning. English law provides a method for a joint tenant to sever the joint tenancy by a unilateral declaration served on the other parties.[10] In *Sivakolunthu Kumarasamy v. Shanmugam Nagaiah*,[11] the Court of Appeal held that this method of severance did not apply in Singapore. The Land Titles Act and the Conveyancing and Law of Property Act were amended in 1993[12] to provide *inter alia* for a form of severance by unilateral declaration in both registered and unregistered land, and this change can be seen as a clear legislative response to *Sivakolunthu Kumarasamy v. Shanmugam Nagaiah*.[13] In the words of the Minister for Law (Professor S. Jayakumar) in moving the second reading of the Bill: "What our amendment seeks to do is to give property owners in Singapore the same rights that joint tenants have in the United Kingdom."[14]

It would therefore make little sense to interpret section 53 so as to enable one joint owner to frustrate his co-owner's wish to sever. Thean J.A. admitted that on a strict construction of the words of the section "registration of the instrument is crucial in effecting the severance",[15] but he preferred a construction "which promotes the purpose or object of the statutory provisions"[16] even though there was no ambiguity or inconsistency in the statutory provisions because "a strict and literal construction of these provisions will not effectively promote their purpose or object".[17]

The problem highlighted by Thean J.A. has now received the attention of the legislature. The new section 53(8) provides that the Registrar may dispense with production of the document of title if he is satisfied that the applicant is unable to produce the document of title despite his best efforts. The new subsection removes the basis of the decision in *Diaz v. Diaz*.[18] It is submitted therefore that there is no longer any need to adopt a strained construction of section 53, and the doctrine of severance acting only *inter partes* does not form part of Singapore law today. On a plain reading of the section, severance under the statute will only occur upon registration of the instrument of declaration.

III. Severance in Equity

Despite the enactment of section 53(8) there are still some minor problems that could occur on severance. Suppose, as seems to have happened in

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10 *Law of Property Act, 1925* (U.K.), 15 & 16 Geo. 5, c. 20, s. 36(2).
11 [1988] 1 M.L.J. 341 [*Sivakolunthu*].
12 *Land Titles Act* 1993 (Sing.), No. 27 of 1993.
13 *Sivakolunthu*, *supra* note 11.
14 Singapore Parliamentary Debates, Vol. 60, Col. 377 (18 January 1993).
15 *Diaz*, *supra* note 3 at 367.
16 *Ibid.* at 370.
17 *Ibid.*
18 *Diaz*, *supra* note 3.

Diaz v. Diaz, A serves an instrument of declaration severing the joint tenancy between himself and B, but fails to register it. B may believe that the joint tenancy has been severed and amend his will accordingly. This could produce unfair results if it transpires on B's death that the joint tenancy was never in fact severed. The problem could perhaps be avoided by providing in the Land Titles Rules that every instrument of declaration should contain a caution warning recipients that the declaration may be of no legal effect until it is registered. Alternatively, as will be seen below, it may be possible to argue that severance in equity has occurred.

Another difficulty might occur where A lodges the instrument for registration, but either A or B dies before the instrument is actually registered. In theory, computerisation of the registry of titles should make it possible to avoid such a problem. However, even where the register is computerised, there may be a time lag before registration is completed. Rule 50(2) of the Land Titles Rules[19] provides as follows:

> Upon the lodgment of any instrument for registration or notification affecting land comprised in a computer folio, the Registrar shall, not later than 48 hours after 12 noon of the day of such lodgment, enter on the computer folio the particulars of such lodgment.

There is a clear analogy here with cases where one party makes a gift of property to another, but completion of the transfer of the property depends on the acts of a third party. This might occur where the property in question is shares in a company or registered land. Title to the shares or the land will only pass on registration by the company secretary or the Registrar of Titles. In such cases, equity will intervene to provide that the transferor will hold his title on a constructive trust for the transferee, so long as he (the transferor) has done everything which, according to the nature of the property, was necessary to be done by him in order to transfer the property.[20]

One would expect therefore that equity would intervene too in the present case. The only relevant head of severance in equity is the first head of *Williams v. Hensman*,[21] that of the act of one of the joint tenants operating on his own share. There is here an area of overlap with severance at common law, which is effected by disposal or, as it is usually said, by "alienation". Indeed, the example usually given of severance in equity is the case where one joint tenant concludes a specifically enforceable contract to transfer his share to a purchaser.[22] It is submitted, however, that the first head of *Williams v. Hensman* should not be limited to alienation in equity. In England there

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19 Cap. 157, 1999 Rev. Ed. Sing.

20 *Re Rose* [1952] Ch. 499; *Mascall v. Mascall* (1984) 50 P. & C.R. 119.

21 (1861) 1 John & H. 546 at 557–8.

22 For a more detailed discussion see Crown, "Severance of Joint Tenancy of Land by Partial Alienation" (2001) 117 L.Q.R. 477 at 481–2.

is authority for the view that the commencement of litigation relating to the share of the joint tenant severs the joint tenancy.[23] Clearly, such a form of severance could not be characterised as a type of alienation, but in any event doubts have been expressed as to whether the commencement of litigation can sever.[24] The obvious difficulty is that mere commencement of proceedings seems insufficiently conclusive to amount to an "act" on which severance is based because the litigation may subsequently be abandoned or discontinued. It is submitted that the service of an instrument of declaration under section 53 is in no way an equivocal act on the part of the signatory to the declaration. It amounts to a clear intention to sever and would, in the case of unregistered land, be sufficient in and of itself to sever the joint tenancy. It is submitted therefore that in the case of registered land, service of an instrument of declaration under section 53(5) effects severance in equity under the first head of *Williams v. Hensman*.[25]

IV. Shares on Severance

The new section 53(6) provides that

> Upon the registration of the instrument of declaration which has been duly served … the respective registered estates and interests in the registered land shall be held by the declarant as tenant in common with the remaining joint tenants and shares in the registered land shall be equally apportioned by the Registrar among the declarant and the remaining joint tenants.

In moving the second reading of the Bill, the Minister of State for Law (Associate Professor Ho Peng Kee) said:

> [T]here have been owners claiming to unilaterally sever joint tenancies into unequal shares. The Registrar is not in a position to verify the truth of such claims. Therefore, the Bill now states very clearly that unilateral severance of a joint tenancy can only be in equal shares.[26]

It seems strange that such a problem should have arisen. It is quite clear that upon severance at common law or in equity the joint tenants become

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[23] *Re Draper's Conveyance* [1969] 1 Ch. 486.

[24] See, for example, *Nielson-Jones v. Fedden* [1975] Ch. 222 at 236.

[25] The present writer has previously suggested such an approach as the solution to the problem originally posed by *Diaz*, *supra* note 3. See Crown, *supra* note 7 at 170–1. Needless to say, it is not suggested here that *any* unilateral declaration purporting to sever should be effective under *Williams v. Hensman*. Such a proposition would clearly run counter to *Sivakolunthu*, *supra* note 11. It is submitted merely that service of an instrument under s. 53(5) should effect severance in equity.

[26] Singapore Parliamentary Debates, Vol. 73, Col. 1919 (11 July 2001).

tenants in common in equal shares. As Walton J. said in *Nielson-Jones v. Fedden*:[27]

> [E]ach joint tenant is seized (*sic*), as it was put in the old books, 'per mie et per tout'—in half and in whole. This would be more accurately stated by saying that, if there are 'n' joint tenants each is seized of 1/nth and the whole: the Anglo-Norman formula deals only with the typical case of two joint tenants. Their interests as such tenants are necessarily equal: they cannot possibly be unequal: see Co.Litt., 186a; 299b; *Challis's Law of Real Property*, 3rd ed. (1911), pp. 366 and 367, 'each has an equal aliquot share' … From which of course it follows that upon a severance the person severing will take 1/nth of the property beneficially, where 'n' is the original number of the joint tenants ….[28]

Section 53 is intended merely to add an additional method of severance to the forms already existing at common law or in equity. It does not purport to alter the general law of co-ownership. There should have been no doubt therefore that the formula given by Walton J. should apply too on statutory severance. Nevertheless, given that questions did arise on this point, it is helpful to have the matter spelt out clearly in the statute.

Where A and B are joint tenants of land and wish to sever their joint tenancy, so that A should have a three quarters share in the land and B only one quarter, they are in effect agreeing to a transfer of a one quarter share from A to B. It seems from the Minister's speech that cases have arisen where parties wanted to achieve a result like this. Given that it was felt necessary to spell out in the statute the effect of severance, one wonders why the legislature chose simply to restate the common law position. As a matter of policy, there can be no objection to A and B agreeing a rearrangement of their interests as indicated. Indeed, they can still do this by executing and registering an appropriate transfer after registration of the declaration severing the joint tenancy. It would have been possible to have avoided the need for this extra documentation by enacting instead of the present section 53(6) an alternative provision to the effect that the shares of the parties should either be equally apportioned or should be such as are stated in the declaration, provided that all the relevant joint tenants have signed the declaration to indicate their consent. The disadvantage of requiring

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27 [1975] Ch. 222 at 228.

28 As the use of the word "beneficially" in the last sentence of the quotation shows, Walton J. was clearly thinking principally of severance in equity. Severance at common law is no longer possible in England (*Law of Property Act* (U.K.), 1925, s. 36(2)). However, it is quite clear from the reference to the "old books" that what he said applies also to severance at common law.

extra documentation is that this means incurring additional transaction costs and fees.[29]

By parity of reasoning with the new section 53(6), section 53(3) has been amended to make it clear that tenants in common who wish to convert their interests to a joint tenancy can only do so where immediately prior to the declaration they were tenants in common in equal shares. Co-owners with unequal shares who wish to hold as joint tenants must first therefore effect a transfer of some of the interest of the co-owner with the larger share to the one with the lesser share. The amendment has the merit of clarifying a point which was obscure under the previous legislation. However, again one has to wonder why it was felt necessary to require extra documentation when it would have been very simple to have provided expressly that even tenants in common entitled in unequal shares can become joint tenants by executing the appropriate instrument of declaration.

Section 34 of the Land Titles Amendment Act 2001 makes consequential amendments to section 66A of the Conveyancing and Law of Property Act[30] to bring the position in unregistered land into line with that which now obtains in registered land. However, section 66A(4) as amended states now that upon service of the deed of declaration of severance of the joint tenancy

> the respective estates and interests in the land shall be held by the declarant as tenant in common with the remaining joint tenants and shares in the registered land shall be equally apportioned by the Registrar among the declarant and the remaining joint tenants.

The language is clearly copied from the new section 53(6), but the references to "registered land" and the "Registrar" are unfortunate errors because section 66A deals with unregistered land. However, as noted above, the position at common law is the same as that intended by the new provision, so it is quite clear that after service of the declaration the new tenants in common will hold in equal shares.

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[29] This may, of course, be seen as an advantage depending on one's perspective!

[30] Cap. 61, 1994 Rev. Ed. Sing.