THE TAXATION OF JOINTLY OWNED PROPERTY

by Michael Firth

INTRODUCTION

Jointly owned property is extremely common. Trustees,[1] partners[2] and joint bank account holders are just some of the examples. Family homes are very often jointly owned as well – whether the owners are aware of it or not. Properly understanding the nature of the legal concepts involved and how the tax legislation applies is, therefore, a vital addition to the toolbox of all tax practitioners. This article seeks to explore just some of the questions that can arise, including:

- Can the income entitlements of joint owners differ from their capital entitlements?
- Is an asset made available/provided by a company if it is owned by the company and a director as joint owners?
- Can "shared" goodwill be used to move the value of goodwill without any tax charges?

The nature of jointly owned property

Logically, jointly owned property is simply a "joint" version of ordinary ownership. Whilst difficult to define, a sufficient definition of ownership for present purposes is that it consists of two basic elements: the right to enjoy the property and the right to freedom from the interference of others in that enjoyment. These rights are generally protected via the torts of conversion (chattels) and trespass (land). Of course, the owner may limit his or her rights if he or she so decides, but that, in itself, is an aspect of the original right to enjoy the property in whatever way the owner chooses.

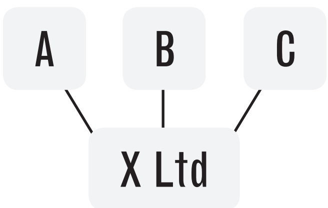
Joint ownership must, therefore, refer to the situation that exists when two or more persons enjoy these rights in the same asset, at the same time. There may also be a sense in which the enjoyment of the joint owners has to be "at the same level". Thus, we would not normally say that a landlord and a leaseholder jointly own the property, even though both have rights to enjoyment in the same asset. The simplest way of expressing this is to say that joint ownership must be joint ownership of the same interest in the asset, although this may not be quite right in all case.[3]

Two kinds of joint ownership

English law recognises two forms of joint ownership: joint tenancy and tenancy in common. It should be noted that the reference to "tenancy" in this context has nothing to do with leases. Instead, it comes from Latin, via French, and simply means "holder".[4] So when one reads or hears "joint tenant", one should understand "joint holder".

The fundamental theoretical difference between joint tenancy and tenancy in common is that, whereas joint tenants are each entitled to the whole of the asset, tenants in common are each entitled only to a share of that asset, albeit that the asset has not been divided, hence they have an "undivided share".

A helpful way to think about tenants in common is by way of an analogy with a company:[5]



Assume that X Ltd owns only one asset, a house. Assume further that A, B and C each own 1/3 of the company (three shares, one each). Each shareholder has a separate asset that they can dispose of and which is worth what a 1/3 interest in the house is worth (subject to the articles and memorandum etc.), but no shareholder has a right to any particular part of the house owned by the company. Similarly, tenants in common will own a proportion or share of the asset owned in common and can dispose of their interest, but they cannot point to any particular rooms in the house and say that they own those rooms. Their shares are undivided and this distinguishes tenants in common from, say, owners of adjacent plots land.

One consequence of the undivided share is that each tenant in common has a right to possess or control the whole of the property, but neither is entitled to exclusive possession/control as against the other. Indeed, if one tenant in common tenant carried out an act arrogating the whole asset to him or herself, he or she commits the tort of conversion. [6] In practice, the co-owners will usually have a formal or informal agreement or understanding as to how they will use the asset.

Joint tenancy, on the other hand, does not involve the concept of each joint owner being entitled to a "share" or a proportion of the whole. Instead, each joint owner has a full right to the whole of the asset in question.[7] The "jointness" arises from the fact that there is at least one other person with exactly the same right to the whole asset. From the law's perspective, it is as if there is only one owner.

It is possible for tenancy in common and joint ownership to exist in the same asset. For example, if A, B and C are joint tenants, but C severs his joint tenancy, then A and B are joint tenants of a 2/3 undivided share and C owns the other 1/3.

With these theoretical points explained, it is possible to understand (rather than just be aware of) one of the key practical differences between joint tenancies and tenancies in common – survivorship. Survivorship is the rule that says that when one joint tenant dies, no interest in the property owned as joint tenants passes to the deceased's legatees.

Instead, if, for example there were previously two joint tenants, there will now be one full owner, the survivor. There is no similar rule for tenancies in common.

The explanation for this difference is the nature of the two interests. Joint tenants each own the whole of the property rather than a share in it. When one joint tenant dies, there is simply one fewer owner of the whole of the asset.[8] Once there is only one joint tenant left, the ownership simply becomes ordinary ownership. Tenancy in common, on the other hand, does not achieve this result, because each tenant does own a share of the property, and there is no automatic reason why the surviving tenant should become entitled to a share in the property that he or she was not previously entitled to.

Converting a joint tenancy into a tenancy in common (severance)

Joint tenancy can be converted into tenancy in common by giving notice of severance to the other joint tenant(s). Upon the happening of such an event, the severing joint tenant gains an undivided share in proportion to the number of joint tenants there were. This explains why it is common to think in terms of joint tenants as owning a 50% share, even though that is not technically correct.

Joint tenancy is also severed if one of the joint tenants sells his or her interest. This makes sense – whilst A might be happy to have the survivorship rule apply as between himself and B, he may not be happy to have it applied as between himself and C (especially if C is a company). In technical terms it occurs because the unity of title, which is a prerequisite for the existence of a joint tenancy, is broken – C's title derives from B, rather than the same source as A's title.

Insolvency also severs joint tenancy so that the joint tenant's creditors are protected. Obviously, death does not sever joint tenancy (hence the survivorship rule) but if a joint tenant dies leaving an insolvent estate, it is possible for creditors to apply to the court for an order that the surviving joint tenant must pay an amount to the estate not exceeding the value lost to the estate (Insolvency Act 1986, s.421A).

At law and in equity

The only assets that can be owned as tenants in common at law are chattels. Where land or choses in action are subject to co-ownership, in order for there to be a tenancy in common, there will be a joint tenancy at law (if there is more than one legal owner) and then a tenancy in common in equity. For land, this rule derives from Law of Property Act 1925, s.1(6), and the explanation was the perceived difficulties a purchaser could face in trying to identify and negotiate with tenants in common, whose number could increase on every death if the deceased's interest passed to multiple persons.[9]

For choses in action, the rule derives from common law.[10] The explanation arises from the fact that choses in action are essentially obligations; often to pay money. If there was a tenancy in common at law, the debtor would have to work out who to pay and how much to pay each, which, for the reasons explained above, could be quite complicated. On the other hand, the rule of law that payment to any joint creditor is sufficient to discharge the debt[11] makes a joint tenancy far simpler to operate.

Identifying Jointly owned Property

The basic condition for the existence of a joint tenancy is the satisfaction of the four unities:[12]

- Unity of possession – each joint owner is entitled to use the whole of the jointly owned asset.
- Unity of interest – the joint tenants must have the same right to the asset.
- Unity of title – each joint tenant must derive his or her title from the same immediate source.
- Unity of time – the interests must vest at the same time.

Tenancy in common requires only unity of possession.

Nevertheless, these unities do not help us understand what will actually cause joint ownership to come into existence. Three main ways can be identified:

a. Express declaration;
b. Resulting trust arising from a contribution to the purchase price;
c. Constructive trust (in particular common intention constructive trusts of the family home).

'Proprietary estoppel' should not be ignored, but plays second fiddle to common intention constructive trusts in the context of family homes and is not fully developed in relation to non-land assets (although see *Strover v. Strover*[13]).

(a) Express declaration

The expressed intention of the parties is a fundamental basis for the law's intervention, so its role in relation to jointly owned property is unsurprising. In relation to land, the land transfer form used for conveyancing (TR1) provides an opportunity for the transferees to make a declaration of a trust to determine the beneficial enjoyment of their co-ownership. Such a declaration will also lead to the entry of a "Form A" restriction on the Land Registry:

> *"No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court."*

In other words, an individual registered proprietor cannot dispose of title to the land without first appointing a second trustee. This ensures overreaching of the underlying equitable interests in the event of sale.

(b) Resulting trust

Where more than one person contributes to the purchase price of land (or another asset), in money or money's worth, there is a "presumption" that the land is held on trust for the contributors in proportion to their contributions and irrespective of who is the legal owner (*Dyer v. Dyer*[14]). If the contributions are unequal, this will necessarily be a tenancy in common.

In the event that there is an express declaration of beneficial interests in the land this will usually override the resulting trust analysis, but will, obviously not bind a contributor who is not party to the declaration (*City of London BS v. Flegg15*). Nevertheless, this result is, potentially, subject to the common intention constructive trust.

(c) Constructive trusts

As a general guide, one should consider whether there is a constructive trust in any circumstance where it is felt that it would be "unconscionable" or "unfair" for the legal owner to deny some interest to another person. That is of course, only the starting point, and one then needs to find a legal hook to hang the particular case on, but as a mental "trigger", unconscionability is useful (see, for example, *Pennington v. Waine*).[16]

One area which merits a little more extended treatment is the common intention constructive trust of the family home. In relation to family homes,[17] the courts take the legal position (i.e. who the registered proprietors are) as a starting point. Thus, if there is a single legal owner it is presumed that he or she is the sole beneficial owner and if there are two registered owners, equal beneficial entitlement is presumed.

These are, however, only presumptions, and they can be rebutted by any evidence which suggests that the parties' common intention was something different. Such intentions are to be deduced objectively from the parties' conduct and what that would reasonably have conveyed to the other party. If it is not possible to ascertain by direct evidence or inference the parties' actual intention, each is entitled to that share which the court considers fair having regard to the whole course of dealings between the parties (*Jones v. Kernott18*). Financial contributions and promises made between the couple are relevant, but many other factors will be taken into account.

Such beneficial interests are not set when the property is acquired and may change as the parties' relationship and conduct changes (e.g. contributions to the mortgage). Lord Hoffmann referred to this aspect of the trust as making it an "ambulatory constructive trust" (*Stack v. Dowden19*), which reflects the position that, in theory, the trust has always existed and that the entitlements have varied over time. This is as distinct from "remedial" constructive trusts, which exist in the US, and allow the court to impose a constructive trust as from the date of the judgment. The fact that the common intention constructive trust is not a remedial trust is crucial for tax purposes, as will be seen below.

One point that has not been resolved beyond doubt is the question of whether an express declaration by the parties can, effectively, be overruled by the courts imposing a constructive trust. In *Pankhania v. Chandegra*,[20] the Court of Appeal held that an express declaration could not be so varied. However, in the earlier case of *Clarke v. Meadus*,[21] the High Court held that express declarations are not immutable or incapable of being affected by subsequent events. By analogy with the law on pre-nuptial agreements, my view is that such express declarations should be upheld if they are freely entered into by each party with a full appreciation of its implications unless some overriding unfairness has arisen in the meantime (*Radmacher v. Granatino22*).

JOINTLY OWNED PROPERTY AND INCOME TAX

The starting point when one looks at income arising from jointly owned property is generally taken to be that tenants in common are entitled to the income in proportion to their entitlement to the underlying capital and joint tenants are entitled in proportion to the number of joint tenants (i.e. 50:50 if there are two tenants). Most of this part will be spent looking at potential exceptions to that rule, before considering the relationship between jointly owned property and the benefits in kind legislation.

Income shifting between spouses/civil partners

For spouses/civil partners there is a presumption for tax purposes that they are beneficially entitled to income arising from jointly owned property in equal shares (ITA 2007, s.836). Note, however, that certain types of income are excluded from this rule (s.836(3)):

- Income to which neither of the individuals is beneficially entitled;
- Partnership income;
- Income from a property business to the extent that it includes the commercial letting of furnished holiday accommodation;
- Income from shares in a close company;
- Income that is treated as the income of a specific person pursuant to some other rule.

There is another exception to this rule that applies where the spouses/civil partners are:

1. Beneficially entitled to the income in unequal shares; and
2. Their beneficial interests in the income correspond to their beneficial interests in the property from which it arises.

In those circumstances, the spouses may make a joint declaration of their beneficial interests in the income and will thenceforth be taxed in accordance with those interests, provided notice is given to HMRC within 60 days (s.837(3)). Such a declaration should be made on form 17 and is optional for each different asset owned. One further point is that it is wise to draw up a deed to act as evidence of the spouses' entitlements (if one does not already exist) given that the default legal position will likely be a joint tenancy (if there is co-ownership at all). HMRC's current practice is to insist upon evidence of the unequal entitlements.[23]

Sections 836 and 837 are interesting for two reasons. First, they, by necessary implication, permit spouses to engage in asset/tax planning. Obviously the spouses can alter the incidence of tax by altering their beneficial entitlements to the underlying asset. It is also possible, however, for one spouse to own 99% of the property and the other to own 1%, but for the spouses to be taxed on 50% of the income each, if no declaration is made. The reasons why one spouse may wish to keep hold of the bulk of the asset as opposed to giving it to his or her spouse will be for that spouse to explain!

The second interesting point is that s.837 expressly contemplates the possibility of a joint owner's beneficial entitlement to income from an asset being different from that owner's beneficial entitlement to the underlying asset. This is the subject-matter of the next section. In relation to spouses and civil partners, s.837 means that property which the spouses/civil partners own jointly cannot benefit from any such split in capital and income entitlement. However, s.836 only applies where all of the owners of the joint property are spouses or civil partners,[24] so introducing a third party will enable them to move outside of the ss.836 – 837 regime.

Splitting capital entitlement and income entitlement

The fundamental question to be answered in this section is whether the income entitlement of a tenant in common can be made to differ from the tenant's entitlement to the underlying capital. Logically, this ought to be possible – one can create a trust on (largely) any terms one wants, so why not one that effects such entitlements? The view to the contrary is premised on an assumption that there is some necessary and basic connection between entitlement to the capital value of an asset and entitlement to income from that asset. On analysis, however, that assumption turns out to be wrong.

In the first place, it is wrong in terms of the historical path of the law on joint ownership. As a matter of basic law, both tenants in common and joint tenants are each entitled to the whole of the income from the jointly owned asset and neither joint owner is entitled to any income as against the other joint tenant/tenant in common. Overall, therefore, neither tenant has an absolute entitlement to any amount. It was thus previously the case that a tenant in common could collect all of the income and keep it for himself, without any consequence, as long as he did not oust the other tenant in common from the property:

> "There is no doubt as to the law before the statute of 4 Ann. c. 16. If one tenant in common occupied, and took the whole profits, the other had no remedy against him whilst the tenancy in common continued, unless he was put out of possession, when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety, and the other accepted that appointment, when an action of account would lie, as against a bailiff of the owner of the entirety of an estate."[25]

The statutory provision Parke B was referring to is section 27 of Statutes 4 and 5 Anne c.16 which was introduced in 1705 and read as follows:[26]

> "Actions of accounts shall and may be brought and maintained…by one joint tenant and tenant in common… against the other, for receiving more than comes to his just share or proportion…"

It should be noted that even after the intervention of Parliament there was still no necessary link between capital entitlement and income entitlement. For example, if the income was the result of effort put in by one tenant in common alone, it would not be unjust from him or her to take all of the income:

> "Again, there are many cases where profits are made, and are actually taken, by one cotenant, and yet it is impossible to say that he has received more than comes to his just share. For instance, one tenant employs his capital and industry in cultivating the whole of a piece of land, the subject of the tenancy, in a mode in which the money and labour expended greatly exceed the value of the rent or compensation for the mere occupation of the land; in raising hops, for example, which is a very hazardous adventure. He takes the whole of the crops: and is he to be accountable for any of the profits in such a case, when it is clear that, if the speculation had been a losing one altogether, he could not have called for a moiety of the losses, as he would have been enabled to do had it been so cultivated by the mutual agreement of the cotenants?"[27]

Nor, it should be noted, does the existence of a trust, at least for land and choses in action, directly affect this position because tenants in common are not fiduciaries vis-à-vis each other.[28]

Second, it is uncontroversial that partners, who generally own partnership property as tenants in common, can agree to entitlements to partnership income that are different from entitlements to partnership income. It would be very difficult to justify a rule that allowed partners to divide up income in any way that they chose, but restricted non-partnership joint owners to mirroring their capital entitlements. The only necessary difference between the two situations is the existence of a "business". Indeed, there may be very good reasons for the parties deciding upon such a disconnect between income and capital, as *Henderson v. Eason* recognised.

Third, such a possibility is expressly contemplated by ITTOIA s.837, as mentioned above, and it is also contemplated by HMRC in their manuals (at PIM1030):

> "Where there is no partnership, the share of any profit

> or loss arising from jointly owned property will normally be the same as the share owned in the property being let. But joint owners can agree a different division of profits and losses and so occasionally the share of the profits or losses will be different from the share in the property. The share for tax purposes must be the same as the share actually agreed."

Fourth, such a possibility was expressly accepted by the Special Commissioners in *Kings v. King*.[29] The Commissioners accepted both that Mr and Mrs Kings were the joint owners of a property (paragraph 59) and that Mrs Kings had surrendered her entitlement to rent, and therefore could not be taxed on an entitlements basis (paragraph 62). The Revenue's argument was not that this was impossible, but that the evidence did not support such a surrender.

One issue that could arise is whether such a situation amounts to a settlement for the purposes of CGT, income tax or IHT. The question for CGT purposes is whether the two co-owners are absolutely entitled as against the trustees.[30] It appears that such joint owners are still absolutely entitled vis-à-vis the trustees – their capital entitlements are no different to those of standard tenants in common.

For IHT purposes, the question is whether property is held for persons in succession.[31] As long as there is nothing binding the parties to persist with the tenancy in common – and thus the divergent entitlements to income and capital (which could be analysed as an interest in possession trust of an amount equal to the difference between capital entitlement and income entitlement) – the absolute entitlement of the tenants in common ought to mean that the property is not held for persons in succession.

Finally, if taxpayers are intending to implement such a situation, they will have to be careful to ensure that the receipt of income matches entitlement and thus extra income is not received by the joint owner who is claiming he or she should not be taxed on it. The reason for this is that many taxing provisions make the person who is entitled or in receipt of the income liable. For example, interest is taxable on the person receiving or entitled to the interest,[32] and the First Tier Tribunal used this shortcut to taxation in *Halpin v. HMRC.*[33]

Issues Relating to Joint Bank Accounts

The general rules for taxing income arising from joint bank accounts are as stated above, but two traps should be noted that apply particularly to joint bank accounts. The first trap is that the beneficial interests, and thus the basic entitlements to income, may not be what they are expected to be. HMRC have shown a willingness to apply equitable presumptions when deciding what they believe the beneficial entitlements are.

For example, in *Bingham v. HMRC,*[34] HMRC were asking the Tribunal to apply the presumption of advancement on survivorship. Essentially, the father (Mr Bingham) had put money into a bank account which was held jointly with his children. Between strangers such a gift would give rise to a presumption of a resulting trust in favour of Mr Bingham (i.e. the children would hold their interests in the bank account on bare trust for Mr Bingham). Obviously, the children were not strangers, and normally a gift from a father to his children is subject to the presumption of advancement, but where the gift is of an interest in a bank account, there is a presumption of advancement on survivorship. In other words, during the father's lifetime the money standing to the credit of the account is held beneficially for the father, but on his death, the children take it beneficially.[35]

The Tribunal did not record the full complexity of this submission and instead referred simply to the basic presumption of a resulting trust.[36] On the facts, it did not matter because the Tribunal applied the settlements legislation (see immediately below), but it may be that cases will arise where these presumption are more important.

The second trap is that the settlements legislation, as mentioned above, can undermine any purported gift of an interest in a joint bank account if the donor is still beneficially entitled to draw on the account (ITTOIA 2005 s.619 ff.). This was the basis of the decision in *Bingham*, where the Tribunal accepted that there was an informal family settlement excluding the father, but he was not excluded in legal terms, and thus was caught by the settlements legislation.[37] Had the family arrangement been binding, with Mr Bingham simply acting as a trustee, the legislation would not have applied in respect of his adult children.

Jointly Owning a Property with a Company

Ordinarily, if a company purchases an asset, say a car or a house, and permits an employee or director to use that asset, a charge will arise under the benefits in kind tax code.[38] If, however, the individual were to jointly own the asset in question with the company, the question arises as to whether the asset has been "provided"[39] or "made available",[40] or whether the individual's use of the asset can be solely attributed to his or her rights as a joint owner?

In three cases, the taxpayer has lost this argument. All involved cars that were owned by the individual as a tenant in common with the company. The difference was how the car came to be in co-ownership:

- *Christensen v. Vasili*[41]– The company bought the car and transferred a part share to T.
- *Samson Publishing Ltd v. HMRC*[42]– The company and T bought the car together, as tenants in common.
- *G R Solutions v. HMRC*[43] – T bought the car and transferred a part share to the company.

In *Christensen*, Pumfrey J relied heavily on the fact that the employee obtained his interest in the car from the employer, it was thus 'conferred' on him by the employer.[44] However, he also said that if the car was not "made available" then nor was there any question of the employee being permitted a benefit in the form of the use of the employer's 95% interest.[45] In other words, if the joint ownership was sufficient to avoid the "made available" test, it also avoided the residual benefit test.[46]

In *G R Solutions*, the Tribunal held that one must apply the expression "made available" to the point in time at which the vehicle is used and was persuaded by the argument that:

> "…if both the employer and the employee want to use the car at the same time, it is not possible for part of the car to go to one destination and part of the car to another, and that when the employee uses the car for private purposes, the employer's share of the car is being made available to the employee at that time." [32]

Based on this logic, it appears that the mistake that all of these taxpayers made was to use a tenancy in common rather than a joint tenancy. As was explained above, a joint tenancy involves two persons being viewed from the law's perspective as the sole owner. No question of undivided shares is involved, thus the employer could not be making its share available – it has no such share.

Similar reasoning may apply to jointly owned land/houses if the company and the employee/director are joint tenants, although the trust of land rules add complexity.[47] HMRC's own view of such situations is that they have arguments to support a benefit charge, but that the strength of these arguments will depend on the facts of the case.[48]

JOINTLY OWNED PROPERTY AND INHERITANCE TAX

Jointly Owned Property as Part of the Estate

No particular issue arises in relation to tenancies in common – the undivided share is part of the deceased's estate and passes in accordance with his or her will/the rules of intestacy. Joint tenancies are where matters get a little more complex because, as was explained above, the death of a joint tenant causes them to drop out of the picture – nothing passes to any donee. Nevertheless, this does not avoid a tax charge because IHT looks at a person's estate immediately before death.[49]

Further, the fact that the joint tenant is about to die does not affect the value of the joint share. In this way a joint tenant's rights are different from the rights of a life interest holder. The value of a life interest holder's rights immediately before he or she dies is nil – no one would buy that right (applying reasonable foresight, but not hindsight – *MacArthur v. HMRC*[50]). For a joint tenant, the important difference is that the joint tenancy could be severed in the instant before death, meaning that the deceased's interest's descent into worthlessness is not inevitable.

The value of a share in jointly owned property is less than the equivalent proportion of the value of the asset as a whole. This reflects the difficulty in selling that interest and the right of the other co-owner to use the property. HMRC's starting point is generally a 10% reduction. No reduction is available, however, if the co-owner is a spouse or civil partner. This is because the joint interest is valued with the "related" property in the spouse's estate.[51]

Gift with reservation

One interesting point about the interaction between jointly owned property and the gift with reservation rules should be noted, and this arises in relation to discounted gift trusts. The point of this tax planning is that the settlor gifts away property into a discretionary settlement under which he or she retains a right to annual payments of a certain amount for life. The transfer of value into the settlement is reduced by the value of the retained right, because that is how one calculates the net loss to the settlor's estate.

HMRC accept that this planning avoids the gift with reservation rules and the pre-owned asset tax rules; instead, their interest is normally in the value of the retained right (see, for example, *HMRC v. Bower*[52]). Further, whilst it is normally effected using insurance based products, there is no reason the same reasoning should not apply to ordinary trusts.

The relevance of jointly owned property comes when one wants to carry out the planning with two spouses. There are two benefits to doing this. First, both spouses' nil rate bands can be made use of. Second, the rights to annual payments last for two lives rather than one which gives rise to a joint lives premium when calculating the discount (and thus allows the couple to settle more, even taking account of the two nil rate bands).

Problems would arise if the spouses independently created two separate discounted gift trusts, with each being able to benefit from the trust created by the other spouse because the reciprocal settlements would mean that there was a gift with a reservation.

In order for the spouses to create the trust together, they must settle property that they own as joint tenants. This is because the essence of the planning is that each spouse carves out a right to annual payments from the right that he or she already has. If the spouse was to acquire new rights as part of the settlement process (i.e. in an undivided share settled by the other spouse as a tenant in common), there would be a gift with a reservation. Such an outcome is avoided by settling property owned as joint tenants because both spouses are fully entitled to the whole of the property settled (rather than just an undivided share in it). They can, therefore, both be said to carve out their rights.

Bank accounts and double taxation

Where a bank account is held by persons as joint tenants, each holder may access the whole of the value of the bank account. Each holder, therefore, has power to dispose of the property and thus the value is in each holder's estate (IHTA s.5(2)). When an account holder dies, IHT is due on the value in that person's estate and, subsequently (or, perhaps, at the same time), when another holder dies, IHT appears to be due again on the same value.

This potential double taxation was recognised by the Court of Appeal in *Melville v. IRC*:

> "A clear example [of a provision that produces double taxation]…is one falling within s 5(2) of the 1984 Act, the very common case of a joint bank account which permits any holder to draw on that account. The same property, the moneys in the account, is under s 5(2) taxable on the death of each holder."[53]

Nevertheless, in practice, and apparently by way of concession, HMRC treat each account holder as beneficially entitled only to the proportion of monies in the account which he has contributed (see *Melville* at §36).

IHT and the Constructive Trusts

There may be cases where the parties are unmarried (hence no inter-spouse exemption can apply), but a common intention constructive trust means that the home the partners shared was already held on trust (at least to some extent) for the surviving partner. Potentially, the same or similar reasoning can apply to other assets, such as shares and one should always be on the look out for possible constructive trusts.[54] Such trusts can reduce the surviving partner's estate for IHT purposes, although one has to consider whether the gift with reservation rules or pre-owned asset tax rules may apply.[55]

JOINTLY OWNED PROPERTY AND CAPITAL GAINS TAX

Exchange of interests in jointly owned property

There used to be a concession (D26) that permitted co-owners to separate out their interests in co-owned land without incurring a chargeable gain (i.e. to divide their shares). This has now been enacted in TCGA 1992 s.248A, the key conditions for which are, inter alia, that the consideration for the disposal is or includes an interest in a holding of land held jointly by the co-owners and the disposal results in each of the co-owners solely owning part of the original holding. There have been suggestions (apparently from HMRC) that "land" here does not include a building. This has to be wrong (see s.288 and Interpretation Act s.5 and Schedule 1).

Co-owned shares and entrepreneur's relief

No advantage can be gained in relation to reliefs that require a certain level of shareholding by jointly owning sufficient shares to satisfy that requirement. For example, in relation to entrepreneur's relief, if persons hold shares jointly, the individuals are treated as the sole holder of so many of the shares as is proportionate to the value of the individual's share (TCGA s.169S(3)).

Shared goodwill and disincorporation

Ordinarily, extracting the goodwill from a company will involve the shareholders being taxed under capital gains or dividend principles, and the company paying corporation tax on a chargeable gain. Disincorporation relief has just been introduced, but with a very low cap of £100,000 for goodwill that will make it useless for many taxpayers.[56] Is it possible to achieve a similar effect, at least as regards the goodwill, without the tax consequences, by careful analysis of intellectual property law and tax law?[57]

The starting point has to be the action of passing off which is the way that goodwill is generally protected in the absence of registered trademarks. Five basic elements must be established in order to succeed in an action for passing off:[58]

1. A misrepresentation;
2. Made by a trader in the course of trade;
3. To prospective customers of his or ultimate consumers of goods or services supplied by him;
4. Which is calculated to injure the business or goodwill of another trade; and
5. Which causes actual damage to a business or will probably do so.

As a first step towards achieving the desired result, one can focus on the concept of a "misrepresentation". When dealing with groups of companies, the unregistered trademarks are not normally recognised by the public as referring to any single company within the group; instead, they represent the group as a whole. From this it follows that the group can rearrange its business internally in whatever way it likes, without there being any question of a deception arising. Thus Templeman LJ said in *Revlon Inc v. Cripps & Lee Ltd*:[59]

> "No purchaser knows or cares whether REVLON FLEX is made in Wales by a Venezuelan company or in New York by a Delaware corporation."

Similarly, no issue of misrepresentation arises when a new company is added to the group and takes the group name. For example, in *Dawnay, Day v. Cantor Fitzgerald*,[60] a 50:50 joint venture was set up by the Dawnay Day group on the one hand and Cantor Fitzgerald on the other. Whilst the joint venture continued it traded under the Dawnay, Day brand, but Cantor Fitzgerald later bought the joint venture's business and was found liable in passing off for continuing to use the Dawnay, Day name for the purchased business. The relevant part of the Court of Appeal judgment is the discussion of the legal state of affairs whilst the joint venture persisted:

> "So long as DDSL was carrying on its business as "part of the Dawnay, Day Group", an attempt by any or all of the other Dawnay, Day companies to restrain DDSL

> from trading as Dawnay, Day Securities would, in my opinion, have failed. It would have failed because DDSL could have relied on its implied licence to trade as "Dawnay, Day Securities". It would have failed, also, because DDSL in trading under that style would not have been misrepresenting anything."

Where customers would not care whether a particular individual or group of individuals provided the service or goods through a company which they own or in their own names it ought to logically follow that, even if the goodwill is owned by the company, the company cannot rely on the law of passing off to restrain use of the unregistered trademarks the company uses because there is no deception.[61] This will be particularly true of persons providing services.

Based on this, and depending on the facts, one can say that there is no reason why the shareholder must transfer the goodwill to himself in order to start trading using the same unregistered trademarks used by the company.

Is it possible to go further and establish that valuable goodwill accrues in the sole-trader? Consider what would happen if the company eventually ceased all business, but the sole-trader kept on trading under the same mark. Whilst a person does not lose their goodwill the instant that they stop trading,[62] goodwill is normally regarded as destroyed if the business is abandoned in circumstances where there is no intention to recommence it at a later time.[63] Thus, when the company permanently abandons all business, it will cease to own any goodwill.

At this point, at the very latest, it must be the case that the sole-trader now owns goodwill associated with the mark as otherwise his business will be unprotected and anyone could pass of their goods or services as his. But equally, there cannot have been any transfer of goodwill from the company to the sole-trader because a transfer of goodwill in gross (that is, without also transferring the underlying business), is void (a point that HMRC recently relied upon, successfully, in *Iliffe News v. HMRC*[64]). Instead, the sole-trader has acquired his own goodwill in the mark without any acquisition from the company.[65]

In fact, the correct analysis appears to be that up until that point, the company and the sole-trader "share" goodwill in the relevant trademark. For example, in *City of London Group PLC v. Lothbury Financial Services Limited*, Proudman J held that a company formed using the group name acquired goodwill in that name:[66]

> "In any event, until the administration, LFS did only non-PR consultancy work and it was formed under that name originally with the consent of LF. LFS was accordingly an existing company formed legitimately under a name which included the words "Lothbury Financial". Thus LFS shared the goodwill of that name and any change in the ownership of part of the goodwill owned by LF could not affect the goodwill of LFS. There is no misrepresentation simply by continuing to use a name after any connection between the two companies has ceased."

This idea of "shared" goodwill has sometimes been expressed in terms of joint ownership of the goodwill,[67] but that has usually been without any analysis of how such a conclusion fits within the framework of jointly owned property generally. In particular in cases such as *Lothbury Financial Services*, LFS could not have acquired ownership of part of LF's goodwill because that would be an invalid transfer of goodwill in gross. Difficult questions would also arise as to what the proportions of tenants in common would be, given that neither party has considered the issue, and whether a joint tenancy would even be possible in light of the four unities. The preferable explanation of "shared" goodwill is, therefore, that it is two separate assets of goodwill, that happen to be associated with the same trademark.

In terms of the capital gains analysis of the above, it appears that:

- The company has at no point disposed of its goodwill, it retains it for as long as it is contemplating carrying on business;[68]
- No capital sum has been derived from the goodwill (TCGA s.21);
- No relevant value shifting has occurred (TCGA ss.29, 30).

In terms of the income tax analysis, there may be a question as to whether the company is making an asset (its goodwill) available to the shareholder.[69] This raises similar issues to those which arise in relation to jointly owning cars and houses with a company. Here, however, the position is arguably stronger because the sole-trader acquires and uses his own, separate goodwill which just happens to be associated with the same trademark as the company's goodwill. The trademark itself is not an asset owned by either person.

CONCLUSION

As can be seen jointly owned property gives rise to a number of potential opportunities in relation to the law of taxation, as well as some potential pitfalls. Spotting these opportunities or pitfalls is half the task, properly analysing the surrounding legal framework is the other half. This article has sought to identify and analyse some of the issues, others will have to await another day – for example, what are the tax consequences of dissolving a company that owns property as a joint tenant?

Endnotes

1. Trustees own as joint tenants so that the survivorship rule (see below) avoids complications if one trustee dies.
2. Partners typically own partnership property as tenants in common because the survivorship rule is seen as inimical to such business relationships. A joint tenancy is, however, possible, if it can be shown that

that was what was intended - *Bathurst v. Scarborow* [2004] EWCA Civ 411.

3. See *Plural Ownership*, Roger J Smith, OUP 2005 at pp.25 – 26 for an interesting discussion of this point in relation to tenancies in common which are generally said not to require such "unity of interest".
4. See, for example, the Domesday Book ("Day of Judgment Book") 1086, which refers constantly to "Rex tenet" – "the King holds".
5. Obviously the separate legal personality of a company means that the shareholders have no proprietary interest in the assets owned by the company, whereas tenants in common certainly do. The analogy is only intended to illustrate the undivided nature of tenancies in common.
6. Note the example given in *Jacobs v. Seward* LR 5 HL at 474, of a ship that was taken out to sea by one tenant in common without the consent of his co-tenant. "In that case it was held that the property was destroyed by the act of one tenant in common, and therefore trover would lie in respect of the co-tenant's share." It appears that Lord Hatherley was only thinking of cases where the property was actually destroyed such that no future benefit could be provided to the other co-tenant.
7. A point that HMRC acknowledge at TSEM9850.
8. The fact that companies do not "die" previously meant that companies could not be joint tenants. This was changed by the Bodies Corporate (Joint Tenancy) Act 1899. Dissolution of the company is corporate death for these purposes (s.1(2)).
9. Note also, in this regard, the rules that (1) if land is to be conveyed to more than four co-owners, the four who are named first take legal ownership as joint tenants holding on trust for all of them (s.34); and (2) even when the beneficial interest is a joint tenancy between the legal owners, s.36 deems there to be a trust so that the trusts of land regulatory provisions (now in TLATA 1996) can apply.
10. See, for example, *Re McKerrell* [1912] 2 Ch 648
11. *Wallace v. Kelsall* 151 ER 765 "…one of the parties has received satisfaction for a joint demand due to himself and others, which puts an end to such joint demand…"; and *Re EWA (A Debtor)* [1901] 2 KB 642.
12. Satisfaction of the four unities does not, however, automatically mean that there is a joint tenancy.

13. [2005] EWHC 860 (Ch).
14. [1788] EWHC Exch J8
15. [1988] AC 54 – parents contributed to the purchase of a property by a couple and the contribution was not by way of loan
16. [2002] EWCA Civ 227.
17. There is no theoretical reason why the same doctrine cannot apply to other types of property.
18. [2011] UKSC 53 at §51
19. [2007] UKHL 16, §62
20. [2012] EWCA Civ 1438
21. [2010] EWHC 3117 (Ch)
22. [2010] UKSC 427, §75, §169
23. TSEM9851.
24. *Bingham v. HMRC* [2013] UKFTT 110 (TC) §58.
25. *Henderson v. Eason* 117 ER 1451, per Parke B.
26. This statute was repealed by the Law of Property (Amendment) Act 1925, Schedule 10. In relation to land it has been replaced by the trusts of land legislation, see now TLATA 1996, ss.12 and 13 which give the courts the right to regulate the occupation of land held in trust and order payments from one co-owner to another.
27. *Henderson v. Eason* at 720 – 721
28. *re Bliss* [1903] 2 Ch 40 at 57
29. [2004] STC (SCD) 186.
30. TCGA 1992, s.60
31. IHTA 1984, s.43.
32. ITTOIA 2005 s.371
33. [2011] UKFTT 512 (TC). The rent was received solely by Mr Kings in *Kings v. King* (above).
34. [2013] UKFTT 110 (TC)
35. *Re Figgis* [1969] 1 Ch 123
36. §43. The reference to Lewin on Trusts (18th Edition) at chapter 9-85 is, however, confirmation that this is the point that HMRC were making.
37. §58.
38. ITEPA 2003 s.63ff.

39. E.g. living accommodation – s.97.
40. E.g. cars and vans – s.114.
41. [2004] STC 935
42. [2010] UKFTT 489 (TC)
43. [2012] UKFTT 234 (TC)
44. §§11 – 13.
45. §11.
46. Now in ITEPA s.201.
47. TLATA 1996, and see *IRC v. Eversden* in the High Court at [2002] STC 1109.
48. Employment Income Manual, EIM11414.
49. IHTA 1984, s.4. See *Lim & Others v. Walia* [2012] EWHC 4187 (Ch) – where a life insurance policy provides for death benefits and terminal illness benefits, if the joint policy holders decide not to claim the terminal illness benefit and instead the survivor gets the death benefit, there was still a joint tenancy of a valuable right to the terminal illness benefit immediately before the deceased's death. In that case this meant that the Inheritance (provisions for Family and Dependants) Act 1975 could apply, but it also means that IHT can apply.
50. [2008] STC (SCD) 1100 at §61
51. IHTA 1984, s.161.
52. [2009] STC 510
53. [2001] STC 1271, §36. See also *John Matthews v. HMRC* [2012] UKFTT 658 (TC).
54. See *Patmore v. HMRC* [2010] SFTD 1124
55. It is difficult to see how there is a "gift" if it is the law, rather than the parties, that is redistributing the interest. In any event, if the trust existed from the very first point of ownership, as often it will, then no interest has ever been transferred from one partner to the other, subject to the point made above about ambulatory constructive trusts. Tax law does not cope well with disposals taking effect pursuant to constructive trusts.
56. Finance Bill 2013, s.58(4).
57. The analysis below is presented with pre-2002 goodwill in mind.
58. See *Spalding (AG) & Bros v. A W Gamage Ltd* (1915) 32 RPC 273, HL.
59. [1980] FSR 85

60. [1999] EWCA Civ 1667
61. Issues could potentially arise in relation to employee or director's fiduciary duties. These would be matters for the company to raise, whether directly or through a derivative action. The unanimous but informal consent of the shareholders will normally sufficient to ensure that even if the company was later sold, the purchasers could not bring an action (*Re Duomatic Ltd* [1969] 2 Ch 365).
62. In *Ad-Lib Club Ltd v. Granville* [1971] FSR 1, the claimant still had goodwill in the name of a nightclub he had owned and run five years earlier. The unqualified proposition that goodwill can only subsist with a business is, therefore, wrong – see HMRC's different view at CG68050. There is also no reason why the transfer of the assets of a business *must*, contrary to the intention of the original owner, also cause the goodwill to transfer; that would amount to expropriation – see *FCT v. Murry* (1998) 193 CLR 605 and *IN Newman Ltd v. Adlem* [2006] FSR 16.
63. The Law of Passing Off, 4th Edition, Wadlow at 3-220; *Ultraframe v. Fielding* [2005] EWHC 1638 (Ch).
64. [2012] UKFTT 696 (TC).
65. Taking this argument to its logical conclusion would mean, in relation to goodwill outside of the 2002 intangible fixed assets regime, that there is a deemed disposal on the extinction of an asset for zero consideration which could potentially give rise to a loss (see TCGA s.24(1) and CG68070).
66. [2012] EWHC 3148 (Ch), paragraph 82. See also *Habib Bank v. Habib Bank AG Zurich* [1982] RPC 1 but note the opposite view in *Dawnay, Day v. Cantor Fitzgerald* [1999] EWCA Civ 1667. The fact that it was a 50:50 venture between the original owner of goodwill in the name and another company in *Dawnay, Day* may explain the court's position that the joint venture could not accrue goodwill in its own name.
67. For example *Sir Robert McAlpine Ltd v. Alfred McAlpine Plc* [2004] EWHC 630 (Ch), at paragraph 18.
68. In theory, if the Court of Appeal was right to find an "implied licence" in *Dawnay, Day* and that applies in non-joint venture cases, HMRC could argue that this licence is a part disposal of the goodwill under TCGA

s.21(2)(b). First, however, licences of goodwill in gross (i.e. without sufficient 'control') are void (The Law of Passing Off, Wadlow, paragraph 3-212). Second, the supposed licensee does not need a licence because even without one, there is no misrepresentation and thus, no passing off. Third, would such a licence have any significant market value? Fourth, any amount actually received for the licence would fall within the intangible fixed assets regime rather than the capital gains regime (CTA 2009, s.896).

69. By virtue of the benefits-in-kind legislation (in particular ITEPA 2003 s.205) applicable to directors or via the close company rules in CTA 2010, s.1064. Note, that s.1064(3) only deems an expense to exist for the purposes of s.1064(2)(a), not s.1064(1) which governs when the section applies.