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Case No: PT-2021-BRS-000065

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 10 February 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

(1) TIMOTHY DAVID DUNBABIN	**Claimants**
(2) ADAM CHRISTOPHER DUNBABIN	
(3) VICTORIA DUNBABIN	
(4) SAM JAMES HUMPHREY	
- and -	
SIMON CHARLES DUNBABIN	**Defendant**

- -
- -

Alex Troup (instructed by **Hugh James LLP**) for the **Claimants**
The defendant in person

Hearing dates: 13 January 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ Paul Matthews :

Introduction

1. This is my judgment on a claim brought under part 8 of the Civil Procedure Rules in relation to issues which have arisen in the administration of the estates of Angela and John Dunbabin. The claim form was issued on 18 June 2021, supported by a witness statement from the second claimant, and opposed by witness statement from the defendant dated 12 July 2021. The claim is also supported by a witness statement from a professional will writer, Terry Oldfield, dated and served 15 September 2021, but subsequently remade with a certificate of compliance that was originally missing on 24 November 2021. The defendant acknowledged service of the claim form on 15 July 2021. District Judge Woodburn gave directions on 26 October 2021 for the final disposal of the claim, and that is before me now.

2. There was also an application by the defendant by notice dated 20 December 2021 for certain relief, but some of this was dealt with before the hearing, and the remainder at the hearing. Accordingly, there was nothing further from the application which in fact I was ultimately required to decide. I therefore need not refer further to that application in this judgment.

Background

3. Angela and John Dunbabin, to whom I shall refer by their first names, for convenience, although without intending any discourtesy, were married for more than 60 years, and had four sons, Michael, Timothy, Simon and Adam. In 1983 they bought a property known as 29 Beverley Place, Springfield, Milton Keynes, Buckinghamshire. It was unregistered land, and was conveyed to Angela and John jointly. The conveyance is silent as to the beneficial interests. It does contain a declaration by Angela and John as purchasers that either of them could give a valid receipt for capital money arising on a disposition of the land, but it is clear law that that is not to be treated as an express declaration of a beneficial joint tenancy: *Stack v Dowden* [2007] AC 432, [51]. However, the (rebuttable) presumption is that equity follows the law, and that therefore the joint legal owners hold on trust for themselves as joint tenants in equity: see *Stack v Dowden* [2007] AC 432, [68]. Neither side argued that that presumption should not apply here. The property was not then in an area of compulsory land registration, and the title to the land remained unregistered in fact until 2021.

4. In 2003 Angela and John executed so-called "mirror" wills, that is, wills which are *mutatis mutandis* in the same terms, but not intending to engage a mutual wills obligation. The wills were prepared by Terry Oldfield. In broad terms, the wills provided for (1) the appointment of the surviving spouse as executor, with Michael and Simon being executors in default, (2) legacies of £1000 to each of five named grandchildren, (3) the trust of the family home for the surviving spouse for life with remainder upon trust for such of the four sons as should survive the deceased, and (4) the residue to the surviving spouse or in the event of the second death as an accretion to the remainder of the property trust.

5. In 2008 they executed fresh mirror wills, in slightly different terms. Broadly speaking, these wills provided for (1) the appointment of the surviving spouse, Michael and

Simon as joint executors, and (2) a property trust similar to that in the 2003 Wills but describing the trust property in different terms (which I shall have to come back to), and (3) the residue to be held on trust for the surviving spouse but in default for such of the four sons as should survive the deceased. The gifts to grandchildren were however omitted. Angela and John also signed an explanatory letter so that their children would know why they had acted as they had. I shall come back to that letter.

6. Both Angela and John spent their last years in a care home rather than living in their property in Milton Keynes. Sadly, Angela died on 27 December 2016. As I understand the matter, probate has not been granted in relation to her estate. Thereafter, John made a new will, on the 24 November 2019, which also was prepared by Terry Oldfield. This will appointed the defendant (Simon) as sole executor and gave 75% of John's residuary estate to him, the rest being shared amongst the other sons. Just over a month later, on 29 December 2019, Michael died at the early age of 64. He had married Victoria, and they had a son Sam. Victoria and Sam were named executors in Michael's will, and duly obtained probate to his estate. John himself died on 4 April 2020, at the age of 91. Probate of his estate was granted to the defendant on 2 May 2020.

7. There appears to have been some discussion, and perhaps an argument, between the surviving sons about the need to sell the Milton Keynes property. It was indeed put on the market and a purchaser was found for it. The devolution of the legal title is simple. Angela and John were joint tenants at law. Angela died first, and the whole legal estate thereafter belonged to John by survivorship. Upon John's death the legal estate passed to his executor, the defendant. But none of this tells us anything about the beneficial interests. Ultimately, however, and to facilitate the sale of the property, on 6 January 2021 the defendant registered the legal title to the property in his own name. The sale had been intended to take place in February 2021, but eventually took place in March, at the sale price of £500,000.

The issues in the case

8. The main issue which arises in these proceedings relates to the beneficial interests in the house. The claimants say that Angela and John in making their 2003 wills severed the beneficial joint tenancy which is presumed to have arisen on the conveyance to them in 1983, so that thereafter they held the legal title as joint tenants upon trust for themselves as tenants in common in equal shares. The result of that would be that, when Angela died, her half share devolved according to her own will, instead of passing automatically to John by survivorship. That would mean that her half share was divided four ways, between the four sons (including the estate of Michael, because although he died before his father he survived his mother). If on the other hand, as the defendant says, there was no severance of the beneficial joint tenancy, then the entire beneficial interest in the property survived to John on the death of Angela, and the defendant will in effect obtain 75% of the value of the house as well as of the rest of John's residuary estate.

9. There is also a subsidiary issue about accounts, which I can deal with more shortly after I have dealt with the main issue.

Fact-finding by civil judges

10. Where there is an issue in dispute between the parties in a civil case, one party or the other will bear the burden of proving it. In general, the person who asserts something bears the burden of proving it. In this case it is the claimants who assert that the joint tenancy was severed. The significance of who bears the burden of proof in civil litigation is this. If the person who bears the burden of proof of a particular matter satisfies the court, after considering the material that has been placed before the court, that something happened, then, for the purposes of deciding the case, it *did* happen. But if that person does *not* so satisfy the court, then for those purposes it did *not* happen.

11. Next there is the question of the *standard* of proof. Civil judges do not find facts on the basis of what is *scientifically certain*, nor even of what is *beyond reasonable doubt*. Instead, they find facts on the basis of what is *more likely than not* to have happened, the so-called "balance of probabilities". And it is the judge, and no-one else, who makes that (objective) evaluative decision. Self-evidently, the parties may have a quite different, subjective, appreciation of what the evidence shows.

12. Thirdly, it is also well known that memories are fallible, especially going back a number of years, and, certainly in commercial cases where there are contemporaneous documents available, these accordingly acquire a greater significance, as being more objective: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22]. Even in such cases, however, oral evidence and cross-examination are however still important. They enable proper scrutiny of the documents, and they also permit the judge to gauge the personality and motivations of witnesses.

13. On the other hand, where witnesses are personally and emotionally involved in events in family life, and death, those witnesses may have more cause to remember events, even going back many years, than any employee of a large corporation may have in relation to a past commercial transaction. Whereas (say) a will writer may write very many wills in a career, family members may be involved in only a handful of such events in their lifetime, and they assume more significance for them. I make due allowance for that, but it does not alter the fact that memories are still fallible, and, once a false memory has been unwittingly absorbed, it may be almost impossible for the witness to divest himself or herself of it, even in a family case. This is particularly a problem with hearsay evidence, which subject to certain procedural safeguards is generally admissible in English civil litigation.

14. Fourthly, judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered. They deal with those that they think are the most significant. Moreover, it must be borne in mind that specific findings of fact by a judge are inherently an incomplete statement of the impression which was made upon that judge by the primary evidence. Expressed findings are always surrounded by a penumbra of imprecision which may still play an important part in the judge's overall evaluation.

The witnesses

15. Mr Oldfield and the defendant were the only two witnesses who attended for cross examination on their witness statements. I record here my impressions of both of them. Mr Oldfield is a retired gentleman with long experience in will writing. I found him to be a straightforward and honest witness, although a little hard of hearing. I am

in no doubt that he was seeking to assist the court, and I am satisfied that he did not tell me anything except what he believed to be true. At the same time, I take account of the fallibility of memory and note that in certain respects his evidence was based on inferences drawn from external matters. One of these was an early statement by him to the defendant that, if the notice of severance had not been registered, then there had been no notice of severance. Of course, as he accepted in the witness box, if the land was not then registered land then a notice of severance could not be registered. Another was his "recollection" that Angela and John had signed a notice of severance, based at least in part on an entry which he said he had seen on his manual record card system. In principle, therefore, I accept his evidence, but with some caution, because he may have been mistaken in certain respects.

16. The defendant was a voluble and often passionate witness. It was frequently difficult for me to interrupt him when he was going off course and giving me excessive or irrelevant information (as unfortunately he did quite often). But I am equally satisfied that he was doing his best to assist the court, and I am equally satisfied that he did not tell me anything he knew to be untrue. Unfortunately, it is clear that he and his brothers have fallen out very heavily over their parents' estates. The defendant accuses his brothers of failing to assist their parents during the last years, leaving him and his wife to deal with everything, including renovation and repair of the house before it could be rented out and later before it could be sold. During the hearing I emphasised that I was not concerned with the merits of this dispute. My concern was with the matters raised in the claim form, and principally with the question of the severance of the joint tenancy. Nothing I say in this judgment is intended to bear on these extraneous arguments between the two sides. Nevertheless, his palpable sense of grievance may help to explain the volubility and passion of his style of advocacy and giving evidence.

The law of severance

17. Before I consider the evidence before me, both in oral and in written form, I remind myself of the law of severance of joint tenancies. In Megarry and Wade, *The Law of Real Property*, 9th edition at paragraph 12-036, the authors say (footnotes omitted):

> "Before 1926, a joint tenancy could be severed both at law and in equity, but as explained above, this is now possible only in equity. Since 1925, a joint tenancy may be severed in equity in the following ways:
>
> (i) in the same manner as a joint tenancy of personal estate could have been severed prior to 1926;
>
> (ii) by notice in writing to the other joint tenants;
>
> (iii) by the act of some third party;
>
> (iv) by the acquisition of another estate in the land; and
>
> (v) by unlawful killing."

18. So far as concerns the first of these categories, in *Williams v Hensman* (1861) 1 J & H 546, 557, Page Wood VC (later Lord Hatherley LC) listed the three methods by which

a joint tenancy of personal estate could be severed before 1926 (emphasis supplied for clarity):

> "A joint-tenancy may be severed in three ways: **in the first place**, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund – losing, of course, at the same time, his own right of survivorship. **Secondly**, a joint-tenancy may be severed by mutual agreement. And, **in the third place**, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected … ."

19. In the present case the claimants rely on three of these methods of severance: (1) notice in writing under section 36(2) of the Law of Property Act 1925; (2) a mutual agreement between Angela and John to achieve severance; and (3) a course of dealing between Angela and John treating their beneficial joint tenancy as severed.

The evidence

20. The evidence of Mr Oldfield in his witness statement is very clear. At paragraph 8 he recites a conversation with Angela and John at the time of preparing their wills, in which he recommended that they should sever the beneficial joint tenancy, in accordance with his usual practice. In paragraph 9, he says that Angela and John

> "agreed to sever their joint tenancy in line with my advice and I recall that they signed a formal agreement stating that they both agreed to sever the joint tenancy. Both signed forms were posted out".

His further evidence is he did not retain any copies of the notice, and that on his retirement from practice he had passed all the former clients' original will documents still in his possession to a firm of solicitors in Bedfordshire. However, enquiries having been made, I was told that these did not include a file for Angela or John.

21. Mr Oldfield explained that he told Angela and John that, if they registered the title to their property at the Land Registry, the severance could be registered. But, according to him, Angela and John were not keen to incur the extra expense. He therefore suggested signing a notice of severance and keeping it with the documents. He produced a template of his usual notice of severance. This contains the following clause:

> "Having regard to the considerations of Inheritance Tax, and the possibility of having to pay care fees and any other situations that may arise and for each of us to protect our share of the aforementioned property it would be preferable to convert our beneficial joint tenancy into tenants in common so that we each have

> the right in future to dispose of our individual interests in the said PROPERTY and its proceeds of sale under our respective Wills."

22. It is appropriate to set out here the relevant parts of the 2003 and 2008 mirror wills. The property trust in the 2003 wills was created by clause 4(a), which reads as follows:

> "I GIVE UPON TRUST to my four children … equal shares to each one of them of my freehold land and property known as 29 Beverley Place Springfield Milton Keynes Buckinghamshire MK6 3LL or my share of any other property that becomes the main family home that my husband and I have agreed to owned together and in equal shares as tenants in common UPON TRUST with the consent of my husband John Maurice Ramsay Dunbabin during his life to sell the same (but with full power to postpone such a sale without being liable for any loss) and to hold the net rents and profits (if any) and the net income from the proceeds of the sale in trust for my husband during his life and after his death my Trustees shall hold the said house or other dwelling-house for the time being held by them upon the trusts of this gift or the net proceeds of sale or the investments for the time being representing the same UPON the TRUSTS and with and subject to the powers and provisions hereinafter declared concerning my Residuary Estate so that the said property shall be distributed [sic] according to the provisions of clause 6(c) of this my will".

23. The property trust in the 2008 wills was created by clause 3(a), which reads as follows:

> "I GIVE to my Trustees my share of the house known as 29 Beverley Place Springfield Milton Keynes Buckinghamshire MK6 3LL, ,, or my share of any other property that becomes the main family home UPON TRUST with the consent of my husband John Maurice Ramsay Dunbabin during his life to sell the same (but with full power to postpone such a sale without being liable for any loss) and to hold the net rents and profits (if any) and the net income from the proceeds of the sale in trust for my said husband John Maurice Ramsay Dunbabin during his life and after his death my Trustees shall hold the said house or other dwelling-house for the time being held by them upon the trusts of this gift or the net proceeds of sale or the investments for the time being representing the same UPON the TRUSTS and with and subject to the powers and provisions hereinafter declared concerning my Residuary Estate so that this property shall be distributed according to the provisions of clause 5c of this my Will".

24. Following the execution of the 2008 wills, Angela and John signed a letter addressed to their four sons. So far as material, this reads as follows:

> "Our financial adviser asked to see our wills and was concerned that we had added two more grandchildren's names and were proposing to add a great grandchild. He warned that this would cause complications and should always be done by the solicitor and signed and witnessed this is costly and we do not want to go on adding names as every new baby arrives, or paying to rewrite wills again and again.

> We decided to take heed of both of these advisers and make a simpler will name the fewest people, so that after the first death half of the house goes into trust for the four sons, and the survivor keeps whatever money is left, which may be very necessary for some kind of care or help in the house and garden and maintenance of the property and equipment. Before the second person dies a will can be made to leave ALL the money and ALL possessions to sons and families, and of course the families might be larger than they are today. This would give a bit more protection to the survivor, particularly necessary if it were Angela who is not skilled at house repairs or machinery repairs as John is. …
>
> […]
>
> PS PLEASE DESTROY COPIES OF THE PREVIOUS WILL WHICH IS NOW INVALID "

25. In his witness statement, Mr Oldfield further refers to the witness statement of the defendant at paragraph 10, where the defendant says that he visited Mr Oldfield in May 2020 and asked him whether his parents discussed severing their joint tenancy. According to the defendant's witness statement, Mr Oldfield had responded that

> "he had no recollection whatsoever of ever producing a severance document for them or any record of such".

Moreover, he

> "asked if the property or any severance was registered with the Land Registry because that was what he would have advised the client had wanted to change the tensing, I advised that there was no such registration and he concluded that a 'severance obviously had not taken place'."

However, in his own witness statement, Mr Oldfield goes on to say that he did not agree with the defendant's recollection of the conversation.

26. In cross-examination by the defendant, Mr Oldfield said that the initial conversation with the defendant had been by telephone, when he said that he could not respond until he looked at his records. However later he recalled that Angela and John had signed a severance document, because they did not wish to incur the expense of registering the title to their unregistered property. He said it would have been sent out to them with their wills. No copy of the severance document as prepared for them had been kept on his computer.

27. Mr Oldfield was challenged by the defendant about his recollection, given that he had said that he wrote an average of 25 wills a week, which would mean many thousands of wills in his career. He was also challenged as to why the reference to tenancy in common in clause 4 of the 2003 wills had been removed in clause 3 of the 2008 wills. Mr Oldfield accepted that he had omitted to mention the expression "tenancy in common" in the later will, but in his view this did not detract from the content or debase it in any way. He also confirmed that John had wanted the defendant to have 75% of his estate rather than one quarter. He also said that the defendant had left the room whilst John gave his instructions, and then when he returned he was told by his father to stay.

28. In re-examination, Mr Oldfield said that if Angela and John had not accepted the idea of severing their beneficial joint tenancy, he would not have included the property trust clause in either the 2003 or the 2008 wills. But they were concerned to protect their property against care home fees. He also mentioned for the first time that he had kept manual records of the wills that he wrote in a record card index. He had checked the record card for Angela and John, and found that he had noted that a notice of severance had been signed.

29. I find that Mr Oldfield's recollection was prompted by his note on the relevant record card, but that it was none the less an honest recollection. The explanation of why Angela and John did not wish to register the title to the property (on grounds of cost) is consistent with the statement which Angela and John made in their explanatory letter that they did not wish to keep going back to have their wills remade every time there was a new grandchild or great grandchild.

30. The defendant's evidence in his witness statement is, as stated above, that he spoke to Mr Oldfield and that Mr Oldfield could not recollect anything of the interview with his parents in preparing their wills. His evidence is also that he alone had been looking after his parents' affairs for them as they grew older and less able to do so themselves, and that he had all the relevant documents relating to their property, kept in his safe, but there was no notice of severance to be found. He also gave evidence that after his mother's death his father had told him that they had not signed any notice of severance.

31. In relation to the final will made by John, in 2019, which was also prepared by Mr Oldfield, the defendant relied on confirmation from Mr Oldfield as showing that his father John recognised the efforts which the defendant had put into looking after his parents in their final years, by giving him 75% of his residuary estate.

32. The defendant was cross examined on behalf of the claimants. He gave evidence that he had stored the wills and other legal documents (including the original conveyance of the house) on behalf of his parents in the safe at his own home. He accepted that he might have destroyed the 2003 wills on the instructions of his parents, in accordance with the postscript to their explanatory letter to the 2008 wills. However, he said that he did not destroy any notice of severance. He also put John's 2019 will in his safe. After Angela and John paid off their mortgage in the 1990s, the building society handed over their file. This also was put in the safe. He agreed that he had not given disclosure of the documents in the safe, but he had not been asked to do so. He thought John's 2008 will was probably still in the safe, although it had been superseded by the will of 2019. He did not think he had destroyed that. In answer to a question, he confirmed that he had searched through every document in the safe, and the notice of severance was not there.

Severance by notice

33. The physical absence at trial of a notice of severance is not fatal to the claim that severance was effected by such a notice. It is simply a question of fact, whether the court is satisfied on the evidence that the notice was *in fact* signed and given in accordance with section 36(2): see *Chadda v HMRC* [2014] UKFTT 1060, [135]. Accordingly, that is the first factual question which I must decide.

34. In support of their submission that a severance notice was indeed signed by Angela and John, the claimants rely on the following. First there was the evidence of Mr Oldfield as to his usual practice, which was to advise his client to sever the beneficial joint tenancy. This is confirmed by the recital in paragraph 2 of the standard severance template. The idea of the severance as protection against care home fees would, I find, have been attractive to Angela and John. There was also Mr Oldfield's evidence about the record card, and the documentary evidence of the inclusion of the property trust clauses in the wills of 2003 and 2008, which would have been not only unnecessary but also inexplicable if there had been no severance.

35. On the other side, the defendant relies on the following:

(1) the absence of any severance document to be found after his father's death, and in particular not to be found in the bundle of other documents concerned with the property which were kept in the defendant's safe;

(2) the statement by Mr Oldfield to him in May 2020 that, because nothing had been registered, therefore there could not have been a severance;

(3) his evidence that his father John had told him (after Angela's death) that they did not sever the joint tenancy.

36. As I have already said, I am not required to reach a conclusion of fact on the basis of certainty. Instead I reach my conclusion on the basis of simple probability, that is, that it is more likely than not (more than 50% likely) that such and such a thing happened. Here the evidence of the claimants is cogent in support of the proposition that Angela and John did indeed sign a notice of severance. The absence of any such notice to be found after death is a matter to take into account, but it is not decisive. It is just one sheet of paper, and can have become misfiled or even accidentally destroyed. The statement by Mr Oldfield that they could not have been a severance because there was nothing registered is easily explicable by the mistaken assumption the property concerned had a registered title. But it did not. Finally, it may be that John told the defendant that he had not signed any notice of severance, but he would then be a very elderly man remembering something that either happened or did not happen many years before. I do not doubt that John said something of this kind to the defendant, but it is hearsay, and I cannot test it in the same way as I can test the evidence of life witnesses. Its weight is therefore limited.

37. Taking all these matters into consideration, I am in no doubt that the balance of probability comes down in favour of my holding that Angela and John did indeed sign a notice of severance, which cannot now be found. I therefore so find.

Severance by agreement

38. The second way in which the claimants put their case is that Angela and John actually *agreed* to sever their joint tenancy, whether they signed a notice or not. It is clear law that it is not necessary that such an agreement be in writing: see *Burgess v Rawnsley* [1975] Ch 429, 439, 444, 446; *Chadda v HMRC* [2014] UKFTT 1060, [146].

39. Here the claimants rely on a number of indications that such an agreement was made. Firstly there is the use of "mirror" wills. The claimant cited to me a number of cases

on this point. The first was *Re Wilford's Estate* (1879) 11 Ch D 267. Here two sisters were joint tenants of certain leasehold land. They agreed to make wills which left a life interest to the survivor of them and the remainder interest to their nieces. After the death of the first of them, the survivor made a fresh will, inconsistently with their agreement. It was not argued that the doctrine of mutual wills applied and that therefore there was a constructive trust in favour of the original niece beneficiaries. Instead it was argued that by making the agreement between themselves and executing the wills in pursuance of that agreement, the joint tenancy had been severed. Hall VC held that that was correct.

40. This case was followed by Sir Samuel Evans P in *Re Heys deceased* [1914] P 192. In that case a married couple who were joint tenants of leasehold estates made mutual wills, intending them to be irrevocable. After the husband's death, the wife made a new will in breach of the mutual wills agreement. The President said (at 195-96),

> "I am of opinion that the agreement or arrangement made between the husband and wife to execute the two wills, and the execution thereof, severed the joint tenancy, and created a tenancy in common: *In re Wilford's Estate, Taylor v. Taylor* … "

The judge also made clear that he was not deciding this case upon the basis of the effect of the doctrine of mutual wills, because, as he pointed out, he was sitting in the probate court, and not in the chancery court.

41. And, in *Chadda v HMRC*, the question was whether the joint tenants of a property called Park House had severed the joint tenancy. They had made "mirror" wills. The tribunal concluded (emphasis supplied):

> "143. Ms Brown referred to the decision by Mr and Mrs Tobin to execute wills in virtually identical terms; these wills were not mutual wills, but showed a common intention, especially when all the surrounding circumstances were also taken into account. Mr Ryder did not agree with the propositions advanced on behalf of the Appellants that a mutual agreement need not be in writing, and that such an agreement did not need to be formal.
>
> 144. Without going into a detailed consideration of all the authorities and the respective views of the parties as to the effect of those authorities, my view based on the execution of the wills alone is that this could not be taken by itself as an indication that Mr and Mrs Tobin intended to sever the joint tenancy. *The wills made no reference to Park House* (other than as the address of the testator in each case).
>
> 145. However, the execution of the wills needs to be viewed in the context of the financial affairs of the Tobin family, in particular the need to provide care for Mary, the need to provide a home for both Mrs Tobin and Mary, and the family's general financial position. …
>
> […]
>
> 148. My conclusion on the mutual agreement issue is that *on the evidence as a whole, including the wills and the surrounding circumstances*, Mr and Mrs Tobin

> demonstrated a mutual agreement to sever the joint tenancy, as this was the only way in which their agreed objectives could be fulfilled."

42. In addition, the claimants relied on the following:

(1) Mr Oldfield's evidence that Angela and John agreed to sever the beneficial joint tenancy;

(2) the terms of the 2003 and 2008 wills, which seek to give away "my share" in property;

(3) the terms of John's 2019 will, which also seeks to deal with "my share of the property"; and

(4) the terms of the explanatory letter, which referred to "half of the house" going to the four sons on the first death, and the survivor keeping whatever is left, rather than taking the whole by survivorship.

43. As to the last point, in English law, this letter could not be relied upon as an aid to construction of the wills themselves. But it *can* be relied upon in order to demonstrate other matters, such as the question whether Angela and John *agreed* to sever their joint tenancy.

44. On the other side, the defendant relied on the following:

(1) his own evidence that his father had told him after the death of his mother that he and his mother had not signed any severance document;

(2) his evidence that everything in his parents' lives was jointly owned and not severally.

45. In my view, the evidence in this case is more than sufficient to satisfy me that on the balance of probabilities Angela and John *did* agree, at about the time of making the 2003 wills, to sever the beneficial joint tenancy in their house.

Severance by course of conduct

46. The third way in which the claimants put their case was that there had been a course of conduct sufficient to show that the interests of all were mutually treated as constituting a tenancy in common. For this purpose the claimants rely on the matters already referred to under the second head.

47. There is a question under this third route as to how far it overlaps with the second and how far it is separate. In *Williams v Hensman*, cited above, concerning a joint tenancy of personalty, Page Wood V-C referred to

> "any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common",

but added that

> "it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested."

The Vice-Chancellor does not say that the course of dealing must be between the joint tenants themselves, only that that course of dealing must be sufficient *to intimate to the other joint tenants* that the one engaged in that course of dealing intends henceforth to treat the joint tenancy as a tenancy in common.

48. In *Burgess v Rawnsley* [1975] Ch 429, 439, Lord Denning MR referred to the whole passage in which those two extracts appear and said:

> "In that passage Page Wood V.-C. distinguished between severance 'by mutual agreement' and severance by a 'course of dealing'. That shows that a 'course of dealing' need not amount to an agreement, expressed or implied, for severance. It is sufficient if there is a course of dealing in which one party makes clear to the other that he desires that their shares should no longer be held jointly but be held in common."

Hence, a unilateral *notice* given by one joint tenant to the other or others would have been sufficient before 1926 in respect of personalty, as Lord Denning MR also pointed out on the same page a few lines later.

49. And, in the *Chadda* case, the tribunal held that, even if there was no mutual agreement to sever,

> "148. … all the matters which [it had] taken into account under the 'mutual agreement' heading above lead to the conclusion that the joint tenancy was severed by their mutual conduct."

50. The defendant relied on the decision in *Gore v Carpenter* (1990) 60 P & CR 456. In that case, a divorcing couple owned two houses, each as beneficial joint tenants. The husband and the wife agreed in principle that one property should be transferred into the wife's sole name and one into the husband's sole name. However, the wife said that there were ancillary financial matters be decided before final agreement could be reached. The husband was advised to serve a notice of severance in respect of the properties, but declined to do so in case his wife saw this as a hostile act. A divorce petition was served in December 1986, but in January 1987 the husband died, before it was heard. The question was whether the wife acquired both properties by survivorship or whether the beneficial joint tenancy said been severed before the husband's death, and were held in common.

51. The judge held that there had been negotiations as to severance between the parties, but that these had not reached any final agreement, and it would have been open to the parties to argue for a different conclusion if the divorce proceedings had gone to trial. The judge was pressed with the dictum of Sir John Pennycuick in *Burgess v. Rawnsley* (at 447):

> "I do not doubt myself that where one tenant negotiates with another for some rearrangement of interests, it may be possible to infer from the particular facts of a common intention to sever, even though the negotiations break down. Whether such an inference can be drawn must, I think, depend upon the particular facts."

As to this, the judge said (at 462):

> "In the present case there was, of course, such negotiation, but I cannot infer from it a common intention to sever, because I do not think that Mrs. Carpenter was prepared to commit herself at that stage."

52. In my judgment, the facts of the present case are very different from those in *Gore v Carpenter*. There was no reason here, as there was there, to express an agreement in principle but to hold back on the implementation of it. Instead, this was a case where either there was the intention to sever, or there was not. In my judgment, the evidence satisfies me that there was a course of conduct (in particular, the making of the mirror wills) which showed that one party (indeed, *each* party) made clear to the other that that one desired that their property should no longer be held jointly but be held in common.

Conclusion on severance

53. For all these reasons, I find that the beneficial joint tenancy in 29 Beverley Place was severed before the death of Angela in 2016, and accordingly the property was thereafter held by them as joint tenants at law on trust for themselves as beneficial tenants in common. On Angela's death, the legal title vested entirely in John by right of survivorship, but still on trust for himself and his wife's estate as tenants in common. That means that her half share passes under her will. During John's lifetime, he had a life interest in that half share, but on his death that half share passes to Angela's (and John's) four sons in equal shares.

The claim for an account

54. The Part 8 proceedings included claims for an inventory and account under the Administration of Estates Act 1925, section 25, in relation to both the estates of Angela and John. I can understand the claim in relation to the estate of John, because the defendant obtained a grant of probate in relation to that estate. But my understanding is that no grant of probate has yet been taken out in relation to Angela's estate, even though she died in 2016. Since the main asset in her estate would have been her interest in the former family home, it may have been thought sensible to await the decision of the court in relation to the question of severance before proceeding to administer her estate. At all events, I do not see how I can properly make an order for an inventory and account against the defendant when he has not taken out a grant. His position throughout has been that his father took the entire house by right of survivorship and so there was in practice nothing to administer.

55. In relation to John's estate, the most important question is simply what has happened to the net proceeds of the sale of the property. The completion statement in the bundle showed the sum of £492,905 in the conveyancing account, that is, the proceeds of sale of £500,000 less costs. There is also a balance in an account at National Westminster Bank of some £5314.62. I was told that the claimants' main problem is to know whether there are any sums that have been deducted from either account since July 2021. The defendant told me in court that a lot of work had been carried out to the property, and that he had commissioned a memorial stone for his parents, but nevertheless he did not intend to charge anything in either respect. The work that had been carried out the property had been paid for out of his own pocket, and he intended

the cost of the memorial to be paid in the same way. The only remaining matter that had to be resolved in the estate was the question of the capital gains tax due on sale of the house. So there would be no further deductions.

Conclusion on inventory and account

56. In these circumstances, I do not think that the claimants in closing pressed for a formal inventory and account, but in any event I cannot see that it would produce any more information than they already have. Accordingly, I make no order on that part of the claim.