TC04154

Appeal numbers: TC/2013/01011, TC/2013/01012 & TC/2013/01014

INHERITANCE TAX – nil rate band trust – whether joint tenancy of property severed – absence of signed Notice of Severance – draft Notice produced – whether evidence sufficient to show that original Notice served – weight of draft in context of other evidence – held, on totality of evidence, that written notice given – consideration of other methods of severance – held that evidence would have sufficed to show severance by other methods – appeals against determinations allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PARVEEN CHADDA
EILEEN NASH
PAULINE MORONEY **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN CLARK

Sitting in public at 45 Bedford Square London WC1B 3DN on 29 and 30 September 2014

Harriet Brown of Counsel, instructed by Kingston Smith LLP, Chartered Accountants, for the Appellant

Colin Ryder, Senior Officer of HM Revenue and Customs, for the Respondents

DECISION

1. The Appellants appeal against Notices of Determination by the Respondents ("HMRC") dated 8 August 2012, upheld on review dated 9 January 2013, that Mary Bridget Tobin ("Mrs Tobin"), who died on 27 July 2007, was beneficially entitled to a property and that the full value of that property was to be taken into account in ascertaining the value of her estate.

The background facts

2. The evidence consisted of a bundle of documents, which included witness statements given by Graham Young, Parveen Chadda, Eileen Nash and Pauline Moroney, and a Statement of Agreed Facts. In addition, Mr Chadda gave oral evidence. From the evidence I find the following background facts. Certain issues were disputed: I consider these at a later point in this decision, and refer only briefly to them in these background findings.

3. Kingston Smith, the predecessor partnership to the Instructing Accountants, had acted for James Tobin (the husband of Mrs Tobin) and his company James Tobin and Son Limited ("the Company") for a number of years. Mr Chadda, a partner in Kingston Smith, first became involved with them in 1983. From that time onwards he became the partner responsible for the Company and the Tobin family, providing accountancy, business, commercial and personal tax advice.

4. Mr and Mrs Tobin were married for many years until the death of Mr Tobin on 29 September 2003. They had a number of children. In relation to the present appeal, the relevant children are:

(1) Mary Bridget Tobin, named after her mother, and known as "Mary";

(2) Eileen Nash ("Eileen");

(3) Pauline Moroney ("Pauline").

5. Mary was disabled and required round the clock care. This had been the position since at least some time before Mr Tobin's death.

6. Mrs Tobin became ill in 1990, and required more help. As a consequence, one of the three sisters Eileen, Pauline, and Kathleen (who has since died) would always be at their parents' house to look after Mary and Mr and Mrs Tobin. The arrangement was that one sister would live at the house for a month at a time, but with alternative arrangements if that sister needed to look after her own family.

7. In early 2003 it became apparent that Mr Tobin was suffering from cancer. As by 2003 Mrs Tobin had a terminal heart condition, Mr and Mrs Tobin decided that they should make new wills. In particular, they wished to ensure that as much money as possible would be available after Mr Tobin's death to support and care for Mrs Tobin and Mary, and after Mrs Tobin's death to provide the round the clock care needed by Mary.

8. Mr Chadda's firm provided inheritance tax advice to Mr and Mrs Tobin. Mr Chadda's colleague Marcus Everett, who was a lawyer, advised together with Mr Chadda on the advantages of using both Mr Tobin's and Mrs Tobin's nil rate bands. Mr Chadda met Mr and Mrs Tobin to discuss the proposed inheritance tax planning utilising both of their inheritance tax nil rate bands, and the tax saving that would result from this. He explained to them that they would need new wills and might have to sever the joint tenancy of their house, Park House Farm ("Park House") in order to secure the advantage. He told them that he would organise the preparation of the new wills and the notice severing the joint tenancy, in case the joint tenancy had not already been severed.

9. Mr Chadda subsequently met Mr Everett, who prepared the documents for execution by Mr and Mrs Tobin. With the exception in Mr Tobin's case of a clause making specific gifts of shares in the Company, the wills were in identical terms, mutatis mutandis. Mr Chadda then took the wills to Park House, having asked them to organise two witnesses, for the purpose of signing the wills on 30 July 2003. Mr Chadda went through the wills with Mr and Mrs Tobin, showing them where the inheritance tax saving was to be achieved. To the best of his recollection, he was present when they signed their wills. Although Eileen and Pauline were in the house, they did not attend the meeting.

10. At some point, the precise timing not being ascertainable from the evidence, Mr Everett also prepared a notice severing the joint tenancy of Park House. Mr Chadda explained that this was not signed at the time when the wills were signed, because Kingston Smith were waiting to hear from the bank (which held the deeds to the house) with information to indicate whether the joint tenancy had already been severed.

11. Mr Chadda's evidence was that by early August 2003 Kingston Smith had discovered that Mr and Mrs Tobin held Park House as beneficial joint tenants; he had therefore gone to Park House with the notice severing the joint tenancy, and this had been signed by Mr and Mrs Tobin. As this evidence was disputed by HMRC, I consider it in detail at a later point in this decision.

12. Following Mr Tobin's death on 29 September 2003, probate of his will was granted on 21 April 2004. Mr Chadda was the executor, with power reserved to his co-appointed executor Mrs Tobin.

13. Under Clause 4 of Mr Tobin's will, a trust (the "Nil Rate Band Trust") came into effect, as Mrs Tobin had survived him. The amount given to the Nil Rate Band Trust was the largest sum of cash which could be given without any inheritance tax becoming due. At the time of Mr Tobin's death, that sum was £255,000.

14. After Mr Tobin's death, Mr Chadda agreed with Mrs Tobin to transfer the Nil Rate Band Trust's share of Park House into her sole name on the basis that it was agreed, understood and accepted by both parties that the Nil Rate Band Trustees were owed from Mrs Tobin's estate the value of the Nil Rate Band Trust's share of Park House being transferred to her. The agreement was made by way of an oral contract,

the terms of which were that the loan would be repayable on demand and would not be interest-bearing. (Ms Brown referred to this as "the IOU arrangement".)

15. The value of Mr Tobin's share of Park House as transferred to Mrs Tobin was £374,986. Of this amount, £255,000 was due from her to the Nil Rate Band Trust; this amount was due on demand, but the understanding was that it would not be paid until after her death.

16. Mrs Tobin died on 28 July 2007. Probate of her will was granted on 22 July 2008 to Eileen and Pauline as executors, with power reserved to their co-appointed executor Mr Chadda.

17. Clause 8 of Mrs Tobin's will contained a trust which made provision for Mary. Mr Chadda, as the sole surviving trustee of the Nil Rate Band Trust under Mr Tobin's will, exercised his discretion to use the sum of £255,000 due from Mrs Tobin's estate in satisfaction of the loan by applying it and other funds towards the purchase of a new property for Mary, as Principal Beneficiary, to live in.

18. In the form IHT200 and in subsequent correspondence with HMRC relating to Mrs Tobin's estate, a claim was made to transfer the nil rate band in respect of Mr Tobin's estate; the amount of the nil rate band was specified as £300,000. In February 2009 HMRC wrote to Kingston Smith to inform them that transfers of the nil rate band were only available where the death of the surviving spouse occurred on or after 9 October 2007. As Mrs Tobin had died on 27 July 2007, the legislation did not apply and the nil rate band could not be transferred.

19. In his response dated 31 March 2009, Richard Smith (Estates, Trust and Tax Manager with Kingston Smith) noted HMRC's comments. He continued:

> "On examination of the Probated Will of the late James Joseph Tobin we note that a NIL rate discretionary trust was established under the terms of the Will and as insufficient liquid assets were held this trust would have held a debt due on the death of the deceased's widow, Mary. We therefore withdraw our claim for a reduction on Mary's estate of £300,000 but wish to substitute a debt of £255,000 plus interest between April 2004 – July 2007 of £24,862 (39 months @3%). A copy of the Probated Will is attached."

(As shown by Mr Chadda's evidence, Richard Smith's reference to interest was erroneous.)

20. In their letter dated 28 May 2009 to Kingston Smith, HMRC referred to the form IHT200 submitted following Mr Tobin's death. They asked for confirmation, in the absence of information in that form as to the jointly held property Park House Farm, that it had passed by survivorship to Mrs Tobin as the surviving spouse.

21. Richard Smith replied on 3 June 2009:

> "Thank you for your letter of 28 May, regretfully other than the copies of the IHT 200 already supplied to you we no longer hold any correspondence relating to the estate.
>
> From the evidence available it would appear that Park House Farm passed by survivorship to the spouse."

22. Further correspondence ensued. In his letter dated 6 August 2009 Richard Smith gave the following explanation:

> "There is no indication on the IHT account [ie the one relating to Mr Tobin] that the family house was to pass by survivorship, on the contrary, the D4 clearly shows net value of property (half share) £374,986 "net total of joint assets passing by survivorship NIL" the value of the half share being covered by the NIL rate tax band and spouse exemption.
>
> On this basis alone the full NIL rate tax band of £255,000 was available to be covered by the "binding promise" and is now available to Mrs Tobin's estate.
>
> It seems that having provided a "binding promise" the remainder of the estate assets – the Norwich Union policy proceeds were available to be distributed to Mrs Tobin and the attached notes indicate that that is what happened."

23. In their reply dated 8 October 2009 HMRC referred to the consequences of property passing by survivorship; a will did not act upon survivorship property. The writer continued:

> "I am mindful that a joint tenancy can be severed by giving notice to the other joint tenant, in writing; if there are documents available to show that the property, Park House, was not held as joint tenants, but rather tenants in common I would be happy to receive such copies of evidence as you have and give further consideration to this point."

24. The reply from Kingston Smith dated 24 December 2009 was written by Andrew McMichen, Tax and Legal Adviser, who had become involved in place of Richard Smith. In that letter, Mr McMichen stated that a notice of severance had been signed; in subsequent correspondence, he indicated that the whereabouts of the notice of severance were unknown. Ultimately, as a result of further investigations, certain email correspondence was found. (I consider this below, together with other material provided to HMRC in the course of the correspondence.)

25. In a letter dated 25 November 2011, HMRC listed a number of points in respect of which they required confirmation; they did not consider that the burden of proof as to the severance of the joint tenancy had yet been satisfied. In their letter dated 26 March 2012 they indicated that as they had received no reply, they were enclosing an assessment of the outstanding liability to inheritance tax in respect of Mrs Tobin's estate.

26. Following a holding reply explaining that the matters raised by HMRC had required extensive research, partly amongst archived records, Kingston Smith

responded on 20 April 2012. (As the matters referred to in their letter relate to the detailed evidence considered below, it is not necessary to set out those points here.)

27. On 8 August 2012, HMRC sent Notices of Determination to Eileen, Pauline section and to Mr Chadda. Each of these determinations was in the following form:

> "The Commissioners for Her Majesty's Revenue and Customs have determined –
>
> **In relation to** the deemed transfer of value for the purposes of inheritance tax on the death on 27 July 2007 of Mary Bridget Tobin ('the Deceased').
>
> **That** the Deceased was beneficially entitled to Park House Farm, Bower Lane, Lower Eynsford, Dartford, Kent, DA4 0HN and the full value is to be taken into account in ascertaining the value of the Deceased's estate for the purposes of Inheritance Tax having regard to section 4(1) and sections [*sic*] 5(1) Inheritance Act 1984."

In each of the covering letters, HMRC indicated that the recipient could opt for a review. Kingston Smith wrote to HMRC on 5 September 2012, on behalf of Mr Chadda, both to appeal against the determination and to accept the offer of a review.

28. Mr Ryder wrote on 18 September 2012 to reply on HMRC's behalf. He indicated that neither Eileen nor Pauline appeared to have given notice of appeal within the 30 day appeal period, and thus that HMRC were not precluded from commencing proceedings against them to recover tax and interest. He referred to s 223 Inheritance Act 1984 ("IHTA 1984"), containing the requirements for giving and accepting late notice of appeal. He explained that the letter to Mr Chadda had not contained an offer of review, but merely contained details of the steps open to an appellant after validly serving notice of appeal. He had taken Kingston Smith's letter to mean that Mr Chadda required HMRC to undertake a review.

29. Kingston Smith subsequently wrote with detailed information and documentation to Owen Jones, the HMRC review officer. On 9 January 2013 Mr Jones wrote with the result of his review. His conclusion was that the decision in HMRC's letter dated 8 August 2012 should be upheld.

30. On 5 February 2013, Eileen, Pauline and Mr Chadda each gave separate Notice of Appeal to HM Courts and Tribunals Service.

The law

31. The relevant legislation in the context of these appeals is s 36 of the Law of Property Act 1925 (as amended by the Trusts of Land and Appointment of Trustees Act 1996):

> "**36 Joint tenancies**
>
> (1) Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be

held in trust, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity.

(2) No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible, whether by operation of law or otherwise, but this subsection does not affect the right of a joint tenant to release his interest to the other joint tenants, or the right to sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenants:

Provided that, where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity, and thereupon the land shall be held in trust on terms which would have been requisite for giving effect to the beneficial interests if there had been an actual severance.

Nothing in this Act affects the right of a survivor of joint tenants, who is solely and beneficially interested, to deal with his legal estate as if it were not held in trust.

(3) . . ."

In this decision, I refer to this Act as "LPA 1925".

Arguments for the Appellants

32. Ms Brown submitted that the law relating to the appeals was simple. The question was whether the Appellants had shown on the balance of probabilities that the joint tenancy had been severed in one of three ways:

(1) notice to each other;

(2) by mutual agreement of the joint tenants;

(3) by a mutual course of conduct indicating that the joint tenancy was mutually severed.

33. In determining the question, two matters had to be kept in mind:

(1) Since the enactment of LPA 1925, the law contained in s 36 LPA 1925 favoured tenancies in common; it evidenced a preference for joint tenants to be able to sever the joint tenancy.

(2) As a related point, because s 36 LPA 1925 had been enacted to facilitate severance, the fundamental principle was relying on intention. If the parties intended severance, the joint tenancy was severed.

34. Ms Brown acknowledged that the evidence in the present case was not perfect; however, she submitted that on the balance of probabilities, Mr and Mrs Tobin had severed their joint tenancy.

35. I consider later Ms Brown's detailed submissions on the law, and her submissions on the evidence.

Arguments for HMRC

36. Mr Ryder made submissions concerning the approach to secondary evidence, as the Appellants had not been able to produce the notice of severance or a copy of the signed notice. He also made submissions on the other means available to joint owners to effect a severance. As these submissions were made in the context of the factual background, I consider them below, together with the submissions of both parties on the facts and the law.

Discussion and conclusions

37. In order to deal with the parties' submissions, it is necessary first to consider the evidence and then to review the questions of law which arise in the context of the evidence.

38. The central question in this appeal is referred to in the Statement of Agreed Facts:

> "In order for a will to apply to property held as a joint tenant it is necessary to sever the joint tenancy. If a joint tenancy is not severed a person's interest in the property will pass by survivorship, not under the will of that person. The only property held by the Tobins as joint tenants was Park House Farm, the matrimonial home ("**Park House**"). If Mr. and Mrs. Tobin had wanted the Wills to apply to Park House, they needed to sever the joint tenancy of Park House.
>
> The Appellants believe that a notice of severance in relation to Park House was signed by Mr. and Mrs. Tobin, but no copy of the final signed document has been located."

The question is therefore whether the evidence supports the Appellants' contention that the joint tenancy was severed.

39. If it does, Mr Tobin's interest in Park House passed under his will when he died on 29 September 2003. The tax consequences on this basis would be that his nil rate band would have been used to the full extent (ie £255,000) by means of a part of his share in the house becoming subject to the Nil Rate Band Trust; to permit Mrs Tobin to continue to live in the house, this would have been achieved by means of the IOU arrangement.

40. If the Appellants are unable to establish that the joint tenancy was severed, the consequences will be very different from what they state to have been the intention. Instead of Mr Tobin's interest in Park House passing under his will, it would have passed by survivorship to Mrs Tobin, who would have ended up owning the whole of the property outright. As in broad terms there were no other assets in Mr Tobin's estate to satisfy the Nil Rate Band Trust, there would have been nothing within it and therefore the benefit intended to be derived from that trust would have been lost. (At

the hearing it was pointed out by the parties that this initial statement as to Mr Tobin's assets needed to be corrected; as one of the assets in Mr Tobin's estate was an insurance policy worth £76,291, a decision that there had been no severance of the joint tenancy would mean that the assets available to satisfy the Nil Rate Band Trust would be limited to the latter figure.)

41. The burden of proof on the issue of whether there was a severance of the joint tenancy falls on the Appellants; the standard of proof is that it must be on the balance of probabilities. I return below to the question of the extent of the evidence required to support this standard. I consider first the challenges made by Mr Ryder in respect of the evidence, and arrive at my main findings once I have considered the extent of the evidence in the light of my conclusions on those challenges.

42. Section 36 LPA 1925 precludes severance of a joint tenancy of a legal estate in land. However, it expressly permits a joint tenant to sever a joint tenancy in equity; this occurs "behind the curtain" of the legal interest. The first method of severance contemplated by s 36 LPA is by means of a notice in writing from a joint tenant of his or her desire to sever a joint tenancy in an equitable interest. In the Tobins' case, the legal estate was vested in Mr and Mrs Tobin as joint tenants beneficially; they were therefore within the terms of the proviso to s 36(2) LPA 1925. The first issue is therefore whether written notice was given by one of them to the other of the desire to sever the joint tenancy in Park House.

HMRC's specific challenges to the evidence on notice of severance

(a) The evidence for the Appellants

43. Mr Chadda's evidence was that once it had been established by early August 2003 that Mr and Mrs Tobin held their home as beneficial joint tenants, he took the notice of severance to Park House; Mr Tobin signed it first and Mrs Tobin also signed it.

44. In her witness statement, Eileen stated that in August 2003, Mr Chadda brought documents for her parents to sign, and that this was before her father became bedridden in mid to late August 2003. Eileen and her mother went to the kitchen while Mr Chadda and her father conducted their meeting. Mr Chadda then came into the kitchen with a one-page document; Eileen recalled seeing her mother signing that document; her mother explained to her that she was happy and relieved that this document had been signed. A short time after Mr Chadda had left, her father had called Eileen and Pauline into the front room and explained that he and their mother had signed a document that helped to secure the anticipated inheritance tax saving. He also explained that he and their mother had signed the new wills in July so that they did not have to worry about there being enough money available to look after Mary, as continued care for Mary after their deaths was their prime concern.

45. In his evidence, Mr Chadda stated that he gave the signed notice severing the joint tenancy to his colleague Belinda Perry to send to the bank. He did not know

whether she did so. On 31 October 2003 at 16.13 he received an email from Belinda Parry (which was a copy of a message to Marcus Everett) in which she said:

> "I have discussed the issue of the signed Tenants in Common agreement with Barclays and they would like this to remain with us and the Title Deeds will be forwarded to us on repayment of the mortgage using the insurance plans in place.
>
> Parveen [*ie Mr Chadda*] has asked if you could prepare the necessary paperwork to put I [*sic*] place the IOU point, so that when we get Probate we are ready to run with this asap.
>
> Value of house I will determine from Parveen hopefully after his meeting on Monday."

46. Mr Chadda stated that the signed notice had since been lost. Mr Everett had left the firm may years ago and unfortunately he did not appear to have filed the papers concerning this on the client's file. Kingston Smith had searched his computer files as far as possible and obtained evidence of the notice of severance having been prepared by him. Belinda Perry had also left the firm many years ago.

(b) Mr Ryder's specific challenges to the evidence for the Appellants

47. Mr Ryder questioned Mr Chadda on the extent of the record keeping within his firm. Mr Chadda acknowledged that his notes of meetings had not been detailed, and said that he could establish from time sheets what had been done at the meeting. He was the partner at Kingston Smith who was responsible for Mrs Tobin's estate; others working for the firm dealt with the Inheritance Tax forms. He stated that he was aware of all the correspondence relating to the client; however, at a later stage he said that he did not check every document.

48. Mr Ryder asked him whether the advice given at the time of the meeting concerning the wills might have related to anything else; the Inland Revenue Account for Inheritance Tax on the death of Mr Tobin showed that a number of shares in the Company had been transferred to him by Mrs Tobin on 30 July 2003, the date on which Mr and Mrs Tobin signed their wills. Mr Chadda accepted that this transfer had been part of the inheritance tax planning. Mr Ryder then asked Mr Chadda whether it was possible that the one page document signed by Mr and Mrs Tobin in August 2003 might have been the Shareholders Agreement referred to by Mr Everett in a memorandum sent to Mr Chadda on 24 July 2003. Mr Chadda replied that what he would have got Mrs Tobin to sign in the kitchen at the Tobins' house was the notice of severance. In re-examination he explained that the Shareholders Agreement would have been a draft, and that it would not have been a single page document; the document which both Mr and Mrs Tobin had signed in August 2003 was a single page document.

49. Mr Ryder referred to a Statutory Declaration which Mr Chadda had made on 24 March 2011. In that Declaration, Mr Chadda had stated that a Notice of Severance had been sent by Kingston Smith to Mrs Tobin on 8 August 2003, that this had been signed by her in the presence of two of her daughters, and that it had then been served

on Mr Tobin. Mr Ryder put to Mr Chadda that these statements were inconsistent with the evidence which he had given in respect of the present appeal.

50. Mr Chadda replied that 8 August 2003 had been the date on which, according to his firm's systems, the Notice of Severance document had been approved by him; the reference had been to the draft notice. Mr Ryder then asked why Mr Chadda had stated in the Statutory Declaration that the notice had been sent, rather than being taken (as he had stated in his evidence). Mr Chadda's explanation was that at the point when the Statutory Declaration was being produced, other people within the firm had been working on the case. He had instigated searches both at the firm's Redhill office and at its London office. The only document which had been found was the draft, which was shown to have been approved. When Mr Chadda had read through the draft Statutory Declaration, he relied on this having been prepared on the basis of information within the firm's systems. At the point when he signed the Statutory Declaration, he had believed it to be correct.

51. He explained that he was now able to remember the true position as a result of discussion and recollection when preparing his witness statement. He remembered the nature of his relationship with the Tobins as clients, as they generally needed "hand-holding", with meetings at their house; in addition, at the relevant time, they had been very ill. He was now able to recollect that he would have gone to their house with the document.

52. Mr Ryder asked Mr Chadda whether he agreed that the statement made by Richard Smith in the letter to HMRC dated 3 June 2009 (see above) that Park House had passed by survivorship was correct. Mr Chadda disagreed, and commented that Richard Smith had been the third person at the firm to become involved with matters concerning the Tobins' estates.

53. Mr Ryder referred Mr Chadda to the email message from Belinda Perry dated 31 October 2003 (see above), and asked him whether in his view the word "issue" referred to the document or to a question relating to the document. Mr Chadda's interpretation of the message was that it related to the specific document.

(c) My conclusions on the specific challenges

54. In relation to the questions raised by Mr Ryder and the effects of these matters on Mr Chadda's evidence, I have arrived at the following conclusions. I accept that Mr Chadda, in preparing his witness statement, needed to refresh his memory and therefore had to review the information available from his firm's records, rather than having an immediate recollection of the relevant events. As part of this process, his preparatory discussions after considering this information enabled him to recall in greater detail what had happened. As a busy professional adviser dealing with a wide range of clients, he could not be expected to have instant recollection of events relating to particular clients occurring more than ten years before he prepared his witness statement.

55. From his evidence, it was clear that much of his advisory work for the Tobins was dealt with by meetings at their home, and that they were clients needing the advice to be provided to them in a relatively simple and informal way; I accept his evidence that they needed a great deal of "hand-holding". (This approach may have been the reason for the lack of detailed records of his meetings with them.)

56. In that context, I consider that it would have been unlikely for the Notice of Severance document to have been sent by Kingston Smith to the Tobins for signature, as referred to in Mr Chadda's 2011 Statutory Declaration. I regard it as more likely that the information given in the latter document was incorrect, as the Statutory Declaration had been prepared by other persons within his firm, and the information given does not appear to have been consistent with the information subsequently obtained from the firm's records when Mr Chadda's witness statement was being prepared. Mr Chadda appears to have placed too much reliance on those other persons, rather than taking steps to satisfy himself in 2011 whether the document which they had prepared for him was correct in including the statements being adopted by him as his own. It appears to me that Mr Chadda tended to rely on his colleagues for advice and support on technical and legal matters which were not directly within his own main areas of expertise, which was why he did not make detailed checks of documents and correspondence prepared by those colleagues.

57. In relation to Mr Ryder's suggestion that the document taken to the Tobins' house in August 2003 might have been the Shareholders Agreement rather than the Notice of Severance, I consider this unlikely. The memorandum from Mr Everett to Mr Chadda enclosing the Shareholders Agreement was dated 24 July 2003; it referred to this being "with the amendments as discussed". Mr Everett also enclosed the Stock Transfer forms which had been completed by Mrs Tobin; from the subsequent Inheritance Tax Account forms relating to Mr Tobin's estate, the date of transfer was given as 30 July 2003. As mentioned above, this was the date on which Mrs Tobin signed the Stock Transfer form. If there was urgency to deal with the documentation in the light of Mr Tobin's illness, I view it as highly unlikely that it would not have been dealt with until August when Mr Everett had sent the Shareholders Agreement to Mr Chadda on 24 July, six days before Mr Chadda went to the Tobins' home with the wills for them to sign. In addition, I view it as unlikely that a Shareholders Agreement would be simple enough to be capable of being fully set out on a single page.

58. In relation to the evidence as to the signature of the document, I consider it more likely than not that Mr Chadda went to the Tobins' house in August 2003 and arranged for the document to be signed first by Mr Tobin and then by Mrs Tobin. Eileen's unchallenged evidence is that Mr Chadda came with the document before her father became bedridden, which occurred in mid to late August, so he met her father in the front room. She and her mother had gone to the kitchen while Mr Chadda and her father conducted their meeting. Mr Chadda had then come into the kitchen with a one page document, and Eileen recalls seeing her mother signing that document. With one exception, Mr Chadda's evidence is consistent with Eileen's account. He stated in oral evidence that he would have thought that both Eileen and Pauline were present. I find that his evidence relating to Pauline also being present was an erroneous recollection.

59. In Mr Chadda's 2011 Statutory Declaration, he stated that the Notice of Severance had been signed by Mr Tobin in the presence of both his daughters and then served on Mrs Tobin. I have already referred to the circumstances relating to the preparation of the Statutory Declaration; my conclusion is that the latter statement in it drafted for Mr Chadda was incorrect. Pauline's unchallenged evidence provided for the present appeal contains no suggestion that she was present when the document was signed; she refers only to having been asked to go to her parents' house and being called in to see her father, who said that the final step in the inheritance tax saving plan had been taken and that he was very relieved that it had now all been done. I consider that Mr Chadda was correct in his recollection that both Eileen and Pauline were in the house at the time when he obtained the signatures from both Mr and Mrs Tobin, but I am satisfied that Pauline was not in the kitchen when Mrs Tobin signed the Notice.

60. The next question concerns the interpretation to be placed on the email message from Belinda Perry dated 31 October 2003, referring to her discussion with Barclays concerning "the issue of the signed Tenants in Common agreement". Mr Ryder suggested to Mr Chadda that this language ("the issue") referred to a question relating to the document. I do not consider that construction to be at all probable in the context. It appears to me far more probable that Belinda Perry had asked Barclays what should be done with the signed Notice of Severance, and that Barclays had said that there was no need to send it to them. It was clear from the rest of the sentence that the mortgage was about to be repaid out of insurance policy proceeds, after which Barclays would return the title deeds. In such circumstances there would have been no reason for Barclays to be concerned with the Notice; the practical answer was for it to be retained by Kingston Smith. In my view, the "issue" was what should be done with the signed Notice, not some concern to be shared with Barclays as to the absence of such a document. I regard the use of the definite article ("*the* signed Tenants in Common Agreement", rather than "*a* signed Tenants in Common Agreement") as a clear indication that the document being discussed was an actual document and not a hypothetical one.

Other submissions on factual matters

(a) For the Appellants

61. In relation to HMRC's submissions, Ms Brown commented that HMRC had not advanced their own factual case; they did not suggest what else happened, and merely said that in their view there was not enough evidence to support the Appellants' case. Ms Brown submitted that one of the questions being put before the Tribunal was where the balance of probability fell where only one explanation was offered.

62. Ms Brown submitted that the draft Notice of Severance was good evidence in the context of everything else that this was a copy of the document which both Mr and Mrs Tobin signed. It was also clear evidence of a mutual agreement to sever the joint tenancy. The order in which Mr and Mrs Tobin had signed the document was immaterial, as s 36 LPA 1925 did not require a notice of severance to be signed.

63. In Ms Brown's submission, the basis on which the Inheritance Tax Account forms relating to Mr Tobin had been completed after his death was entirely consistent with the joint tenancy having been severed. The calculation in section G of the form ("Estate in the UK, where tax may be paid by instalments") showed a deduction for the £255,000 nil rate band, with the spouse's exemption only being applied to the balance of the assets after deduction on 100 per cent business relief in respect of Mr Tobin's shares in the Company. If HMRC's argument was correct, the spouse exemption would have been applied to the whole value of Mr Tobin's share in Park House. Ms Brown submitted that the Inheritance Tax Account form prepared for Mr Tobin's estate was clearly and entirely consistent with the joint tenancy having been severed. All the evidence pointed to severance, most likely by notice.

64. Ms Brown referred to the basis on which the Inheritance Tax Account forms had been prepared and submitted following Mrs Tobin's death, and the ensuing correspondence with HMRC. In her submission, what was clear was that the inconsistency did not relate to evidence of severance, but instead related to the omission by certain parties to treat the joint tenancy as having been severed.

65. All the evidence pointed towards a Notice of Severance and the joint tenancy having been severed, until matters reached the stage of submission of the Inheritance Tax Account for Mrs Tobin. That document failed to record the IOU arrangement, referred to the incorrect amount for Mr Tobin's nil rate band, and failed to recognise that Mrs Tobin's estate was not entitled to Mr Tobin's nil rate band. The document also contained a number of other errors.

66. Ms Brown submitted that it was not only more likely that Mrs Tobin's Inheritance Tax Account was wrong, but far more likely, and also far more likely that the interest in the property had been severed. Leaving aside the other factors pointing to that Account being incorrect, the inherent probability was that it was more likely to be incorrect than the one prepared for Mr Tobin's estate nearly four years beforehand.

67. Ms Brown argued that following the incorrect Account, the correspondence between Kingston Smith and HMRC had continued in the wrong direction for far too long. Richard Smith had referred to a transferable nil rate band of £300,000; HMRC had pointed out in their letter of 26 February 2009 that transfer of the nil rate band was not available given Mr Tobin's date of death. In his letter of 31 March 2009, it appeared that Richard Smith had investigated matters further, and was now aware of the Nil Rate Band Discretionary Trust. In the light of what he had stated in the earlier letters, his letter of 3 June 2009 in which he stated that Park House Farm appeared to have passed by survivorship was quite extraordinary; the two statements could not both be true.

68. Ms Brown submitted that what had happened was quite clear; the contemporaneous evidence all pointed towards the Notice of Severance having been signed. It had not been until his letter of 6 August 2009 that Richard Smith had described the position by reference to the available details concerning Mr Tobin's estate. Mr McMichen's letter to HMRC dated 24 December 2009 had set out the basis on which the Appellants argued that the joint tenancy had been severed.

69. Once the evidence had been considered fully, it presented quite a different picture from that put forward by HMRC. In weighing the evidence, it was important to consider all the circumstances, particularly the way in which the correspondence between Kingston Smith and HRMC had proceeded.

(b) For HMRC

70. Mr Ryder considered Mr Chadda's evidence and his performance as a witness. Mr Chadda had been hampered by the length of time since the events occurred, and by the absence of much in terms of contemporaneous notes; much of his interaction with Mr and Mrs Tobin had been oral. It seemed that some of his evidence had therefore lacked specific detail and that he had had to resort to generalisations, such as saying that documents were sometimes sent to clients before meetings, and that shareholders agreements were longer than one page. Mr Ryder argued that Mr Chadda could not really remember the position in sufficient detail to be precise, which was understandable given the time since the events, the paucity of background material, and the fact that Mr Chadda was a busy professional with a number of clients.

71. In relation to the evidence of Eileen and Pauline, Mr Ryder argued that they could only provide information in broad terms as to what had happened; they referred to Inheritance Tax planning and the background and context in which that took place, but could say nothing specific about the house or how it was owned, because it seemed from their statements that this level of detail had not been discussed.

72. On the question of written notice of severance, HMRC submitted that the number of inconsistencies suggested that the Tribunal should find on the balance of probabilities that no written notice had been given. The only documentary evidence produced had been the draft Notice; this had not been located at the time when Mr McMichen wrote to HMRC in December 2009.

73. Although the draft Notice had been worded as being given from Mrs Tobin to Mr Tobin, the evidence was that it had been signed first by Mr Tobin and then by Mrs Tobin. HMRC accepted that there was no need under s 36 LPA 1925 for the Notice to be signed, but this was another inconsistency. The draft Notice also indicated that it was intended to be executed in duplicate; it was not apparent from the evidence whether more than one copy had in fact been signed.

74. Mr Ryder referred to the contradictions between the Statutory Declaration made by Mr Chadda in 2011 and his evidence before the Tribunal. (My consideration of these is set out at [43] and subsequent paragraphs above.)

75. The memorandum of 24 July 2003 from Mr Everett to Mr Chadda did not of itself prove that a letter of severance was prepared, nor that it was signed and delivered either by Mrs Tobin or Mr Tobin.

76. The exchanges of emails on 31 October 2003 (referred to above) had occurred a few weeks after Mr Tobin had died. Mr Ryder argued that if there had been a problem with any "tenancy in common agreement", it would have been too late for this to be

dealt with. (Ms Brown intervened to say that HMRC accepted that this could have been done by means of a variation; when Mr Ryder replied to say that this would have been difficult, Ms Brown responded that it could have been achieved by a simple document.)

77. Mr Ryder submitted that looking at the evidence overall, given all the inconsistencies, no notice of severance had been given; it had not been proved on the balance of probabilities that notice had been given.

78. The Appellants had relied on the context in which these events might or might not have happened. There did not appear to be any dispute that this was tax planning. It was a truism that tax planning did not always go to plan; this possibility could not be excluded here. In HMRC's submission, the evidence showed little if anything about what the Tobins' precise intentions were as to the house; in terms of providing a home for Mary, their will provided that, regardless of whether severance occurred, she still stood to benefit after both her parents had died. Thus the issue was confined to effective tax planning, and HMRC suggested that the Tribunal was being asked to conclude that as severance would have secured a more favourable tax outcome, that must have been what happened.

79. Mr Ryder questioned whether Mr Chadda would have been unaware of the letters being sent by Richard Smith; Mr Chadda had been the responsible partner, and also a personal representative and a trustee, and in that capacity had signed the Inheritance Tax Account form for Mrs Tobin's estate. HMRC argued that as Mr Chadda had signed the form to say that the account was correct and complete, the absence of any reference to the IOU in this form was consistent with his understanding at the time.

The parties' submissions on the law

(a) Ms Brown's submissions

80. Ms Brown indicated that the law was largely not in dispute. It was agreed that the wills were not mutual wills. Severance was governed by s 36 LPA 1925. The case of *Williams v Hensman* (1861) 70 ER 862, 1 John & H 546, still provided useful guidance.

81. Putting to one side two more significant disagreements, her general submission was that HMRC were taking the case law authority out of context, a "snapshot" approach, and as a result their interpretation was not the correct one.

82. The first of the two key areas was the weight to be given to the draft Notice of Severance. HMRC argued that none should be given to it. The Appellants submitted that the judgment of the Court of Appeal in *Masquerade Music Ltd and Ors v Mr Bruce Springsteen* [2001] EWCA Civ 513 did not apply in the present case. Even if it were to apply, it would be necessary to look at the surrounding circumstances; Ms Brown submitted that the weight to be attributed to the draft Notice was quite considerable.

83. The second key area of disagreement concerned the effect of the wills. HMRC asserted that for the execution of wills to form part of conduct showing that a joint tenancy had been severed, they must be mutual wills. This view was based on *In re Wilford's Estate: Taylor v Taylor* [1878 W. 241.], (1879) 11 Ch. D. 267, and *Walker v Gaskill* [1914] P 192. For the Appellants Ms Brown submitted that when these were read, they said nothing about needing mutual wills. *Walker v Gaskill* referred only to wills executed in similar terms; it appeared to be the case that *Taylor v Taylor* was heard before the doctrine of mutual wills had been imported into English law, so that the court could not have been considering mutual wills.

84. Under s 36 (2) LPA 1925 there were, broadly, two methods of severing a joint tenancy. The first was in writing; Ms Brown submitted that this was a very loose requirement, as illustrated by the judgment of Henderson J in *Quigley v Masterson* [2012] 1 All ER 1224. The second method was by conduct; she referred to *Williams v Hensman*. She referred to the following comment of Sir John Pennycuick in *Burgess v Rawnsley* [1975] 1 Ch 429, CA, at 448 on severance:

> "(7) The policy of the law as it stands today, having regard particularly to section 36(2), is to facilitate severance at the instance of either party, and I do not think the court should be over zealous in drawing a fine distinction from the pre-1925 authorities."

85. Ms Brown submitted that under s 36(2) LPA 1925 and the case law that all the Appellants were required to do was to show on the balance of probabilities that written notice was given; the order in which that notice was given was irrelevant, as notice could be given by either party to the other.

86. HMRC had contended in their skeleton argument that secondary evidence as to the Notice of Severance should not be admitted, as no reasonable explanation for the non-production of a signed Notice of Severance had been provided; they relied on *Masquerade Music*. In discussions before the hearing, Mr Ryder had agreed that the Notice should be admitted, and that the only question was as to its evidential weight. Ms Brown submitted that the quotation from that case on which HMRC sought to rely had been taken out of context, both of the case itself and out of the general context of the law as it stood. She referred to the judgment of Jonathan Parker LJ at [85]. This raised the question of the balance of probabilities; in her submission, this was answered by the case of *Khan v Customs and Excise Commissioners* [2006] STC 1167 at [79] where Carnwath LJ referred to the statement by Lord Nicholls in *Re H and ors (minors) (sexual abuse: standard of proof)* [1996] AC 563 at 586-587.

87. When looking at the balance of probabilities in the present case, two things had to be borne in mind, namely the comments in *Masquerade Music* and the question of inherent probability or improbability, as considered in *Khan*.

88. On other methods of severance, Ms Brown referred to *Hunter v Babbage* [1995] 1 FCR 569. This showed that there was no need for formality; the agreement between the parties indicated a common intention to sever, as indicated by Sir John Pennycuick in *Burgess v Rawnsley* at 446C. In *Burgess v Rawnsley,* comments in all three of the judgment in the Court of Appeal made clear the importance of mutual

agreement, showing a mutual intention to sever, and also established that there need not be an express agreement to sever. There could be an intention to deal in a certain way with the property.

89. It was clear from *Quigley v Masterson* at [15], in which Henderson J referred to comments made by the deputy adjudicator, that it was possible to have service of a notice of severance and a mutual agreement, or service of such a notice and course of conduct, but not mutual agreement and a course of conduct. Ms Brown stated that the argument as to course of conduct was only relevant if the Tribunal rejected the Appellants' case based on the other two methods of establishing a severance.

90. The question in the case of *Walker v Gaskill* was whether or not mutual agreement was required. The wills in that case were executed in the same terms, mutatis mutandis, as stated in the judgment at p 195. On the following page, the President made clear that under the law as it stood at that stage (ie in 1914), the doctrine of mutual wills was not recognised in English law. At p 197 he emphasised that a will was revocable. His conclusion, expressed at pp 195-196, was that the agreement or arrangement made between the husband and wife to execute the two wills, and the execution of the wills, severed the joint tenancy and created a tenancy in common.

91. The case of *Taylor v Taylor* predated *Walker v Gaskill*, and thus could not have been dealing with the question of mutual wills. Ms Brown submitted that the present case bore a striking resemblance to *Walker v Gaskill*.

(b) Mr Ryder's submissions

92. The Appellants had referred to three strands:

(1) Written notice of severance;

(2) A clear common intention between Mr and Mrs Tobin to sever the joint tenancy;

(3) The existence of a course of dealing sufficient to show a mutual treatment of the joint tenancy as severed.

HMRC were happy to agree that (2) and (3) were mutually exclusive, but not (1) and (2) or (1) and (3).

93. In relation to the evidence, HMRC submitted that the Tribunal was entitled to have regard to the approach in *Masquerade Music* where a key document was missing. There did not appear to be a dispute as to the level or standard of proof, which was on the balance of probabilities. In applying this, the Appellants had referred to *Khan*; they were saying that if something was inherently more probable, then less evidence was required. In the cited passage from *Re H*, Lord Nicholls was approaching the question of the inherent probability or improbability of an event. The Appellants were deriving from that citation the proposition that if something was inherently probable then it needed less strong evidence.

94. Mr Ryder suggested that Lord Nicholls' comments should be looked at in the context of the decision of the House of Lords in *Re B* [2008] UKHL 35 ([2008] 4 All ER 1, [2009] AC 11). He referred to Baroness Hale's comments at [70], and to Lord Hoffmann's opinion at [6], [10]-[11] and [14]-[15]. Mr Ryder submitted that the passage quoted by Lord Hoffmann at [10] showed that although gravity should be taken into account, there was still a level at which proof must be provided, however probable the event under consideration. The question was: how little was too little? HMRC argued that in the present case the proof was too little.

95. On the second strand, whether there had been a clear common intention to sever the joint tenancy, HMRC did not agree with the Appellants' propositions that the mutual agreement did not need to be written and that the mutual agreement did not need to be formal. Mr Ryder submitted that in *Burgess v Rawnsley* the Court of Appeal did not find the evidence overwhelming, but as an appellate court did not consider that it could interfere with the decision reached in the court below. Mr Ryder referred to the judgement of Browne LJ at 442E to 443G. Mr Ryder made similar observations in relation to *Hunter v Babbage*.

96. On the third strand, Mr Ryder referred to the judgment of Norris J in *Olins v Walters* [2007] EWHC 3060 (Ch) at [9] concerning mutual wills, and indicated that HMRC differed in their view from the Appellants on the concept of the binding contract in *Walker v Gaskill*. In that case, the President had confined his consideration to the probate question, namely which of two wills should be admitted to probate, and had declined to deal with questions of trust or contract.

97. Mr Ryder also referred to *Carr v Isard* [2006] EWHC 2095 (Ch) ([2007] WTLR 409). This showed the approach to be taken if the evidence was equivocal. He submitted that in the present case the evidence in respect of the wills was equivocal, and that therefore there was insufficient evidence to find that there was severance.

My conclusions on the law

98. On the question of the weight to be attributed to the draft Notice of Severance, I consider it correct for HMRC to have accepted that the draft was admissible; the weight can only be measured in the context of a review of the totality of the evidence. I deal with this at a later point below.

99. The next point to address is the extent of evidence necessary to support the Appellants' primary submission that written notice of severance was given by one of the Tobins to the other. HMRC's case is that the evidence before me is insufficient to satisfy me that such notice was given. Mr Ryder argued that some minimum threshold of evidence must be reached or exceeded. He based this argument on the statement of Lord Nicholls in *Re H* cited by Carnwath LJ in *Khan* at [79], and submitted that the statement should be looked at in the context of the comments of the House of Lords in *Re B*. On the basis of the citation by Lord Hoffmann in *Re B* at [10] of a comment by Morris LJ in *Hornal v Neuberger Products Ltd*, Mr Ryder derived the proposition that there was still a level at which proof should be provided, however probable the event in question.

100. In her reply, Ms Brown strongly rejected Mr Ryder's contention. I accept her submission that his interpretation, based in part on the citation from *Hornal v Neuberger Products Ltd*, failed to take account of the following comment by Lord Hoffmann in *Re B* at [5]:

> "Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged."

As Ms Brown submitted, the ordinary civil standard of proof as referred to by Lord Hoffmann at [4] is immutable; he referred at [5] to confusion caused by dicta which suggested that the standard of proof might vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. He made it clear at [13] that there was only one civil standard of proof:

> "I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."

101. On the separate and distinct question of inherent probability, Lord Hoffmann said at [14]-[15]:

> "[14] Finally, I should say something about the notion of inherent probabilities. Lord Nicholls said, in the passage I have already quoted, that—
>
> > "the court will have in mind as a factor, *to whatever extent is appropriate in the particular case*, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."
>
> [15] I wish to lay some minimum stress upon the words I have italicised. Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

102. Thus the question whether written notice of severance was given must be examined on the balance of probabilities; in arriving at conclusions on the basis of the totality of the evidence, the inherent probabilities and improbabilities of the events in question must be reviewed in the context of the evidence as a whole. HMRC's submission that there is some minimum level of proof required, however probable the event, must be rejected in the light of the comments made both by Lord Hoffmann and Baroness Hale in *Re B*. I agree with Ms Brown that if something inherently improbable requires strong evidence, it follows that something less improbable requires less evidence.

103. In *Masquerade Music* at [85], Jonathan Parker LJ made the following comments on secondary evidence:

> "Thus, the "admissibility" of secondary evidence of the contents of documents is, in my judgment, entirely dependent upon whether or not any weight is to be attached to that evidence. And whether or not any weight is to be attached to such secondary evidence is a matter for the court to decide, taking into account all the circumstances of the particular case."

104. The latter words emphasise the nature of the examination which must be carried out; it must be by reference to all the circumstances. This brings into focus a wider question. Ms Brown commented that the way in which HMRC had addressed the evidence was to take an individual piece of evidence, look at it and say that it did not prove the Appellants' case. HMRC had then repeated this for each element of the evidence. She submitted that this was the wrong approach; *Masquerade Music*, on which HMRC sought to rely, made clear that it was necessary to look at all the evidence, both in assessing probabilities and in evaluating the evidence.

105. I agree with Ms Brown's submission. The overall approach to be taken in considering the body of evidence was described in a different context, that of income tax, by Mummery J in *Hall v Lorimer* [1992] STC 599 at 612, in a passage approved by Nolan LJ in the Court of Appeal ([1994] STC 23 at 29):

> "In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.
>
> The process involves painting a picture in each individual case. . ."

106. Thus, even if individual elements of the evidence are insufficient to support the conclusion being sought by a party to an appeal, consideration of all the evidence as a composite whole may lead to a finding that the overall evidence does support that conclusion.

107. On the issue of severance, the parties were broadly in agreement as to the ways in which a joint tenancy may be severed. If the evidence establishes that written notice of severance was given in accordance with s 36(2) LPA 1925, that determines the matter, and the appeal succeeds. If the evidence is insufficient to establish that written notice was given, severance can be established if acts or things were done which would have been effectual to sever the joint tenancy of personal estate in equity. Thus the possible bases of severance are:

(1) written notice of severance;

(2) following *Williams v Hensman*, an act of any one of the persons interested acting on his own share;

(3) mutual agreement;

(4) any course of dealing sufficient to intimate that the interests of all the joint tenants were mutually treated as constituting a tenancy in common.

108. Ms Brown referred to the indications in various cases that there was a preference for joint tenants to be able to sever their joint tenancy. I accept that proposition. A clear indication appears in the judgment of Henderson J in *Quigley v Masterson* at the end of [35]:

> "To allow this commonsense conclusion to be defeated by the technicalities of the requirements for security in the March order, which had an entirely different function and looked to her future conduct as her father's deputy, would in my opinion be contrary to the trend of the recent authorities and the policy that the court should lean in favour of severance when it properly can."

109. Ms Brown laid stress on intention. I do not consider that intention alone is sufficient; the relevant party must also take some form of action which demonstrates that such intention is being carried into effect.

110. I therefore consider the evidence to determine whether the Appellants have succeeded in establishing that the joint tenancy was severed by means of any of these methods.

Consideration of the evidence

111. As the Appellants have not been able to find and produce a written Notice of Severance, they are at a disadvantage in seeking to prove that written notice was given. Instead, they have produced a draft document extracted from the limited records and files held by Kingston Smith. Mr Ryder submitted that, if this secondary evidence was to be considered, it should be accorded little weight because it was not consistent with other elements of the evidence.

112. I accept Mr Chadda's evidence that an extensive search was carried out over all the accounts held by Kingston Smith for the Tobin family, and that the only document found was the approved draft of the Notice of Severance. Mr Ryder raised the question of the absence of any information on the face of this document to identify who had produced it, or when it had been produced. After submissions made by Ms Brown concerning the manner in which any such challenge should have been brought, Mr Ryder accepted that the document should be considered as one piece of the evidence. It must be tested in the context of the remainder of the evidence, as indicated in *Masquerade Music* at [85].

113. The draft Notice was not produced to HMRC until some time after the Appellants gave Notice of Appeal to HM Courts and Tribunals Service; there is no mention of it in the correspondence with HMRC culminating in HMRC's review letters to each of the Appellants. I find that the draft Notice was extracted from the

records of Kingston Smith as part of the process of preparing Mr Chadda's witness statement for these appeals.

114. Mr Chadda's evidence was based on his recollections after checking his firm's records, including diaries and time sheets. It was clear from his oral evidence that his approach in dealing with Mr and Mrs Tobin was relatively informal, and that he did not keep detailed formal file notes of his meetings with them. He stated that, following the process of checking the records, he could say for sure from his own recollection that the notice had been signed by Mr Tobin.

115. In addition to Mr Chadda's evidence based on recollection, Eileen's unchallenged evidence (set out at [59] above) is consistent with his evidence. Eileen also stated that after Mr Chadda had left, Mr Tobin called her and Pauline into the front room and explained that he and Mrs Tobin had signed a document that helped to secure the anticipated Inheritance Tax saving. Mr Tobin also explained that he and Mrs Tobin had signed their new wills in July so that neither of them had to worry about there being enough money available to look after Mary, as continued care for Mary was their prime concern.

116. I have already considered Mr Ryder's suggestion that the one-page document referred to by Eileen might have been some other document. As no mention has been made of any other documents apart from the Shareholders Agreement, I find on the balance of probabilities that the document which she saw her mother sign was the Notice of Severance, which had already been signed by Mr Tobin.

117. Mr Ryder raised the question of the order in which Mr and Mrs Tobin signed the document. The draft took the form of a notice given by Mrs Tobin to Mr Tobin, and was in the following form:

> "To: James Tobin of [*address*]
>
> I, the undersigned MARY BRIDGET TOBIN of Park House Farm aforesaid give you notice of my desire to sever as from this day the joint tenancy in equity of and in the property described on the Schedule ("the Property") now held by you and me as joint tenants both at law and in equity so that the Property shall from the date of this notice belong to you and me as tenants in common in equal shares
>
> Dated:
>
> SCHEDULE
>
> **All that freehold dwelling house known as Park House Farm** [*address*]
>
> Signed: …….
>
> Received a notice of which the above is in [*sic*] duplicate:

Signed: ……..

Dated: …… ”

118. Ms Brown submitted that the order in which the document was signed was of no consequence; under s 36 LPA 1925, there was no need for the notice to be signed. I agree and accept this submission. The mere display of the notice to Mr Tobin by Mr Chadda acting on Mrs Tobin's behalf was sufficient under s 36. In the light of Eileen's evidence, I find that there was no duplicate of the document, as she referred only to a one page document; again, there was no need under s 36 LPA 1925 to produce a copy, even if it had been the intention of Marcus Everett when drafting the document that copies should be exchanged.

119. I have concluded above that the email exchange dated 31 October 2003, after Mr Tobin's death, related to the question where the signed Notice was to be kept, and not to some perceived problem as to the absence of such a document. This exchange is therefore additional evidence in support of the contention that the document exists.

120. I accept Ms Brown's submission that the Inheritance Tax Account form for Mr Tobin's estate (submitted in March 2004) was prepared on a basis entirely consistent with the joint tenancy having been severed, and correspondingly inconsistent with treatment of Mr Tobin's share in the property having passed to Mrs Tobin by survivorship.

121. Thus the evidence from August 2003 is consistent with severance. The first suggestion to the contrary did not appear until the submission of the Inheritance Tax Account relating to Mrs Tobin's estate. This Account, dated 28 February 2008 and submitted by Richard Smith of Kingston Smith, described as "Probate Consultant", contained a claim for exemption in respect of Mr Tobin's nil rate band, and the amount of the exemption claimed was £300,000. Even if the exemption had been available, that figure was incorrect; it would have had to be £255,000. As HMRC pointed out in their letter dated 26 February 2009, the exemption was not available, as it would apply only where the surviving spouse died on or after 9 October 2007; Mrs Tobin's date of death was 27 July 2007.

122. In addition, the Inheritance Tax Account for Mrs Tobin showed her residence at its whole value; there was no deduction in respect of the "IOU", ie the monies owed to the Nil Rate Band Trust.

123. Further correspondence from Richard Smith to HMRC also provided information inconsistent with the proposition that the joint tenancy had been severed. It was not until his letter to HMRC dated 31 March 2009 that he referred to the existence of the Nil Rate Band Trust under Mr Tobin's will. In his letter dated 3 June 2009 he stated that from the available evidence it appeared that the property had passed by survivorship.

124. In his later letter of 6 August 2009, Richard Smith set out the explanation based on the information concerning Mr Tobin's estate. This explanation was therefore consistent with the Appellants' contention that the joint tenancy had been severed in August 2003.

125. The subsequent correspondence between Kingston Smith and HMRC, written by Mr McMichen, continued to maintain the Appellants' contention that the joint tenancy had been severed.

126. Ms Brown submitted that the inconsistencies shown in the Inheritance Tax Account form for Mrs Tobin's estate and the subsequent correspondence with HMRC did not relate to the evidence of severance of the joint tenancy, but to the failure in that Account and related correspondence to treat the joint tenancy as having been severed.

127. I accept Ms Brown's submission. Although those inconsistencies must be taken into account, they were subsequently shown to have resulted from a series of erroneous interpretations by Richard Smith. The reason for these errors was that he did not have the relevant information concerning Mr Tobin's estate; once he had that information, he corrected the errors. The statement in his letter dated 3 June 2009 that the property had passed by survivorship was based on the evidence available to him at the time; the information which he subsequently found relating to Mr Tobin's estate made it clear that this statement was very much at odds with the basis on which the Inheritance Tax Account for Mr Tobin had been prepared.

128. Subsequent correspondence with HMRC, and the Statutory Declaration made by Mr Chadda in 2011, were also inconsistent with the evidence relating to matters before Mrs Tobin's death in 2007. I have already concluded that statements made in the correspondence and in the Statutory Declaration were erroneous, and were corrected once the relevant information concerning Mr Tobin's estate was reviewed by Kingston Smith.

129. The statement by Richard Smith in his letter to HMRC dated 31 March 2009 prompted HMRC to request a copy of the Form IHT 200 relating to Mr Tobin's estate. In his reply of 7 May 2009, he expressed surprise that HMRC did not have the original form in their records, and enclosed a copy. HMRC then stated in their letter of 28 May 2009 that they had made further searches of their records and could find no trace of this return; they asked for any other correspondence between Kingston Smith and the HMRC Capital Taxes Office relating to Mr Tobin's estate, but Mr Smith replied to them stating that apart from the IHT 200 forms, his firm no longer held any correspondence relating to that estate.

130. It is not clear why no correspondence relating to Mr Tobin's estate could be traced by HMRC, or why no copy of the IHT 200 form and related schedules was retained by HMRC. As a result, the copy supplied by Kingston Smith is the best (and apparently the only) evidence of the details submitted to HMRC following Mr Tobin's death.

131. The overall picture which emerges from the evidence is that, despite the apparent loss of the original signed document, the Notice of Severance was signed by both Mr Tobin and Mrs Tobin in August 2003 when Mr Chadda came to their house. Following Mr Tobin's death, the Inheritance Tax Account was submitted on a basis consistent with the implementation of the Nil Rate Band Trust contained in Mr

Tobin's Will. The assets listed in the Form IHT 200 were bank and building society accounts totalling £5,675, a life insurance policy worth £76,291 (spouse exemption being claimed for the total £81,966), his half share in Park House (less mortgage) valued at £374,986, and his shares in the Company valued at £300,000 (qualifying for business property relief).

132. The reliefs claimed against the part of his estate where Inheritance Tax could be paid by instalments were:

(1) Nil rate band £255,000;

(2) Business property relief £300,000; and

(3) Spouse's exemption £119,986.

133. Viewing those figures with the benefit of hindsight, it is clear that if the legacy to the Nil Rate Band Trust was to be fulfilled, the liquid funds in Mr Tobin's estate would not have been sufficient. The only basis on which that legacy could have been completely fulfilled would have been to sell his share in Park House, which he would not have been able to do without action being taken to sever the joint tenancy. If, however, Park House were to pass to Mrs Tobin by survivorship, it would not have formed part of his estate. As unquoted shares, the shares in the Company could not in practice have been used to realise such an amount; their apparent value was theoretical and hypothetical. In order to fulfil the legacy without selling Park House, which would continue to be needed as a home both for Mrs Tobin and for Mary, the only practical way would be for Mr Tobin's share in the house to devolve not by survivorship to Mrs Tobin, but beneficially through his estate. To achieve this position, it was essential for the joint tenancy to be severed before Mr Tobin's death.

134. I am satisfied that Kingston Smith, as advisers to Mr and Mrs Tobin, were fully aware of this need for the joint tenancy to be severed. The question of severance was not dealt with at the point when Mr and Mrs Tobin signed their wills, as it was not clear whether the joint tenancy had been severed at some previous stage. Once Kingston Smith had received confirmation from the bank holding the deeds that no severance had previously taken place, it became possible for Mr Chadda to arrange to visit Mr and Mrs Tobin in order to deal with the Notice of Severance.

135. Taking the overall picture into account, I find on the balance of probabilities that Mr and Mrs Tobin both signed the Notice of Severance in August 2003, that the original of that document was lost while in the hands of their advisers, Kingston Smith, and that the unsigned draft document extracted from that firm's records is in the same form as the lost signed original document. The Notice, which did not need to be signed, was first presented to Mr Tobin for signature, thus notifying him of Mrs Tobin's wish to sever the joint tenancy; afterwards on the same day it was handed to Mrs Tobin for her to sign, thus confirming her wish to give notice of severance. I am therefore satisfied that the joint tenancy was severed, and that as a result Mr Tobin's share of Park House devolved as part of his estate rather than by survivorship.

136. Following Mr Tobin's death, the decision was taken that Mrs Tobin and Mary would continue to live in Park House. To achieve this result, it was agreed that the

beneficial interest held within Mr Tobin's estate would be transferred to Mrs Tobin; however, in order to satisfy the legacy to the Nil Rate Band Trust, it was agreed between Mr Chadda as Mr Tobin's Executor and Mrs Tobin that the sum of £255,000 was owed by her to the Nil Rate Band Trustees, and that this sum would be transferred to the Trustees from her estate following her death.

137. Accordingly I make the following finding. At the time of her death Mrs Tobin was not beneficially entitled to the whole of Park House, as her interest in the property was subject to the obligation to pay the sum of £255,000 to the Nil Rate Band Trustees. As a consequence, the obligation to pay that sum falls to be included in the liabilities to be taken into account in determining the value of Mrs Tobin's estate for Inheritance Tax purposes.

138. In the list of Agreed Issues for Determination, the fourth question is (having regard to the answers to earlier questions):

> "What is the net value of Mrs Tobin's estate on which inheritance tax is properly chargeable under the notices for determination?"

As it is not immediately apparent from the Inheritance Tax calculations contained in the evidence whether all necessary information such as possible changes in the value of assets after Mrs Tobin's death is included in the evidence, I do not consider it appropriate for me to specify the figure for the net value of Mrs Tobin's estate. Instead, I leave it to the parties to agree that net value in the light of my decision that Mrs Tobin's beneficial interest in Park House was subject to her (and her Executors') obligation to pay the sum of £255,000 to the Nil Rate Band Trustees.

139. One of the matters raised by HMRC in the course of the correspondence was the absence of anything in the registered title to Park House to show that severance had occurred. They annotated paragraph 10 of Mr Chadda's 2011 Statutory Declaration to show their disagreement with his statement that no legal requirement existed for a severance to be registered with HM Land Registry. To acknowledge the point made by HMRC, it might have been expected that a restriction would have been entered on the registered title, as referred to by Henderson J in *Quigley v Masterson* at [3]:

> "Consistently with their beneficial joint tenancy and the right of survivorship which it entailed, no restriction was entered on the register in the familiar form where a property is beneficially owned by tenants in common, that is to say a restriction preventing any disposition by a sole proprietor of the registered estate under which capital money arises unless authorised by an order of the court."

In addition, HMRC referred in their letter of 25 November 2011 to a different but related issue:

> "Can you please provide evidence to show that when the property was sold the receipt for capital monies was given by two people, as would be required if the property was held as tenants in common?"

140. I accept the implication of HMRC's questions; appropriate conveyancing steps do not appear to have been taken. However, the question at issue in this appeal

concerns the equitable interests in the property, which as I have indicated are "behind the curtain" of the legal estate. The question whether the equitable interests might have been defeated by dealings with the legal estate inconsistent with those interests does not need to be considered in determining whether there was a severance of the joint tenancy in equity between Mr and Mrs Tobin. The only relevance of the absence of the conveyancing steps is that in terms of evidence they are negative factors. However, despite those factors, I am satisfied on the totality of the evidence that there was such a severance.

141. Having reached this conclusion, it is not strictly necessary for me to consider the questions raised by the parties based on other methods of severance. However, in case for any reason my findings as to written notice of severance are overturned, I deal briefly with the questions concerning those other methods.

Whether there was mutual agreement to sever the joint tenancy

142. Ms Brown submitted that if the Tribunal was not satisfied on the evidence that written notice of severance had been given by one of the Tobins to the other, the evidence clearly showed that there had been mutual agreement between them to sever the joint tenancy.

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. The shares in the Company were not readily realisable, whatever their actual value; there were limited assets available to ensure the necessary financial provision. The discussions between family members, in particular the comments of Mr Tobin in August 2003 and of Mrs Tobin on the same day, indicated that they had intended all the necessary steps to be taken to achieve their objectives based on the professional advice received, and that they were satisfied that their wishes had been fulfilled.

146. I do not consider that a mutual agreement needs to be in writing. The only requirement in s 36(2) LPA 1925 for a document in writing is where a written notice of severance is involved. The remainder of s 36(2) contemplates doing "other acts or

things" which would have been effectual to sever the tenancy in equity in the case of personal estate; the clear implication is that written notice is not required.

147. Further, I do not think that the context, involving tax planning and seeking a beneficial result based on the use of an available relief by means of a widely used and accepted method of estate tax planning, affects the conclusion to be drawn from the particular facts of the present case. The need to use such a method was obviated by the change to the legislation in later 2007, but as HMRC pointed out in correspondence, this change was not relevant to Mrs Tobin, as her date of death was before the change came into effect.

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.

Mutual course of conduct?

149. If I am not correct in concluding that there was mutual agreement between Mr and Mrs Tobin that the joint tenancy in equity should be severed, I consider that all the matters which I have taken into account under the "mutual agreement" heading above lead to the conclusion that the joint tenancy was severed by their mutual conduct.

Result of the appeals

150. As the joint tenancy was severed by means of the giving of the Notice of Severance, the appeals of the Appellants against the Notices of Determination dated 8 August 2012 are allowed.

Right to apply for permission to appeal

151. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 27 November 2014