INGRAM v THE COMMISSIONERS OF INLAND REVENUE: ROUND TWO: THE COURT OF APPEAL

Amanda Hardy[1]

Readers of this *Review* will note with interest that a majority of the Court of Appeal (Lord Justice Nourse and Lord Justice Evans) recently reversed the landmark decision of Ferris J[2] in *Ingram v IRC*.[3] Lord Justice Millett, in an exemplary judgment, dissented.

The Facts

Briefly, the facts are as follows. On 29th March 1987, Lady Ingram transferred certain freehold property in Berkshire to her solicitor, Mr Macfadyen. On the same date, Mr Macfadyen executed two Declarations of Nomineeship stating that he held the property as nominee for Lady Ingram.

On 30th March 1987, Mr Macfadyen, acting on the direction of Lady Ingram, executed two leases in favour of Lady Ingram, each for a term of 20 years from 30th March 1987, free of rent.

On 31st March 1987, Mr Macfadyen, acting at Lady Ingram's direction, executed two conveyances and a transfer, the combined effect of which was to transfer the property to four trustees. The dispositions were in each case expressed to be subject to the relevant lease in favour of Lady Ingram. Immediately afterwards,

---

1 Amanda Hardy, Tax Counsel, 24 Old Buildings, Lincoln's Inn, London WC2A 3UJ. Tel: (0171) 242 2744 Fax: (0171) 831 8095.

2 See '*Ingram v The Commissioners of Inland Revenue*: A Leading Decision on the Reservation of Benefit Provisions', Amanda Hardy, PTPR, Volume 4, 1995/6, Issue 2, page 99.

3 [1995] STC 569.

two Declarations of Trust were executed under which the trustees held the property subject to the leases in favour of Lady Ingram, for the benefit of certain beneficiaries.

The Issues

1. Were the leases valid? Can a nominee grant an effective lease to his principal?

2. If the leases were invalid, what interest did Lady Ingram obtain, and when?

3. Was there a gift subject to a reservation under section 102 of the Finance Act 1986?

4. If the leases were valid, did *Ramsay v IRC* apply?

The Judge

Ferris J held that the leases were a nullity on the basis of the Scottish case *Kildrummy (Jersey) Limited v The Inland Revenue Commissioners* [1990] STC 657. The reasoning in *Kildrummy* was that a nominee cannot grant a lease to his principal as a person cannot contract with himself, and leases are a matter of contract law. The writer disagreed with this conclusion, and with the ruling that *Kildrummy* could be considered to be a correct statement of the law of England.[4]

However, Ferris J accepted Robert Venables QC's argument on behalf of the executors that even if the leases were not valid at law, it was contrary to principle that Lady Ingram should have made a gift greater than that which she intended to make and therefore the beneficiaries under the declarations of trust acquired only the beneficial interest in the freeholds subject to equitable leases of which Lady Ingram was the sole beneficial owner. Ferris J held that Lady Ingram acquired these interests simultaneously with the execution of the declarations of trust.

---

4 See *'Ingram v The Commissioners of Inland Revenue*: A Leading Decision on the Reservation of Benefit Provisions', Amanda Hardy, PTPR, Volume 4, 1995/6, Issue 2, page 99.

Ferris J held that there was no reservation of benefit within section 102 of the Finance Act 1986 because the subject matter of the gift made by Lady Ingram was the property shorn of the leasehold interests.

In the light of his finding that the leases were a nullity, Ferris J did not consider the argument on *Ramsay* in any detail.

The Court of Appeal

Lord Justice Nourse and Lord Justice Evans were in complete agreement with Ferris J that the leases granted to Lady Ingram were a nullity. Further, Lord Justice Nourse stated that the reasoning of the Inner House of the Court of Session in *Kildrummy* was "based on principles which are part of English law just as much as they are part of Scots law".

Lord Justice Nourse disagreed with Ferris J that there was an instant of time between the execution of the conveyances and transfer and the execution of the declarations of trust during which the trustees held the property in trust for Lady Ingram. Ferris J had seen the difficulty in the Revenue's argument that section 65 of the Law of Property Act 1925 operated during this period as, if it did, it operated to create in favour of Lady Ingram the very interest which he had already held to be a "legal impossibility".

Lord Justice Nourse took the view that the conveyances and transfer and the declarations of trust took effect at one and the same time. He nevertheless thought section 65(2) inapplicable because it referred to "another legal estate not in existence" which he took to refer to a legal estate which was **capable** of existence [emphasis added]. As the leases purportedly granted to Lady Ingram were, in his view, incapable of existence, they were outside section 65(2).

Therefore, Lord Justice Nourse agreed with Ferris J that the correct view as a result of the leases being a nullity was that preferred by the executors, namely that the trustees as volunteers with notice of Lady Ingram's intention, took subject to an obligation in equity to give effect to that intention, in other words to treat her in all respects as if the leases had been valid.

Lord Justice Nourse held that the property was not enjoyed to the entire exclusion of Lady Ingram and therefore there had been a gift with a reservation of benefit under section 102 of the Finance Act 1986. His principal reason is stated to be that "the right in Lady Ingram was a smaller right or interest comprised in the gift and itself part of it".

Lord Justice Nourse further stated that it would run "quite contrary to the principle of the estate duty authorities or to the principle of any known impost on property for the mere interposition of trustees to be the decisive factor in avoiding a liability for inheritance tax".

With respect, Lord Justice Millett was correct to state that although it makes no difference whether the donor makes a gift direct to the donee or vests the property in trustees and directs them to make the gift, it does not follow that the interposition of trustees can be disregarded, or that the Court is absolved from the necessity of analysing the transaction properly in order to identify the property taken by the donee. In the present case the interposition of the trustees did not affect the substance of the transaction, but it enabled Lady Ingram to overcome the conveyancing problem of creating a leasehold interest and then excluding it from a gift of the freehold. Lord Justice Millett pointed out that this is precisely the kind of problem which has traditionally been solved by resort to a use or trust.

In the light of the fact that he had held that the leases were a nullity, Lord Justice Nourse found it unnecessary, and indeed undesirable, to consider the circumstances of the case in the light of the *Ramsay* principle. He provided cold comfort to the executors by stating that, subject to the application of *Ramsay*, if the leases had been valid, the outcome of the appeal would have been governed by *Munro*, and the appeal would have failed.

Lord Justice Evans appears to have been guided by his surprise that it is possible to create a leasehold interest in land, segregate the freehold reversion and then gift the freehold reversion without becoming liable to tax under section 102. He stated that he would be prepared to hold in any other context that this could not be regarded as a proper interpretation of the section. However, he appreciated that in the context of tax legislation it is necessary to consider the legal analysis with the utmost precision.

Nevertheless, he found that the leases were invalid and section 102 did apply due to the "inescapable fact that the leasehold is a derivative interest which, being in favour of the donor, could not take effect in law or, I would add, in equity until the donee became a party to the transaction".

Lord Justice Millett dissented in a clear, precise and well reasoned judgment, which despite his fear, was not, in the circumstances, a word too short or too long.

Lord Justice Millett held, he stated with satisfaction, that a nominee can grant an effective lease to his principal and that the leases in this case were valid. He stated that he had some difficulty in accepting the reasoning in *Kildrummy* as accurately reflecting the position in English law as it treated a lease as exclusively contractual

in nature and the relationship between a bare trustee and his beneficiary as analogous to that between an agent and his principal. He acknowledged that this may be the position in Scottish law or in a civilian system, but it would be "an unsafe foundation upon which to base a proposition of English law which is not supported by clear authority". As a matter of principle the rights involved are proprietary and not contractual and do not contravene the two party rule. He then went on to demonstrate clearly why the authorities cited in support of this proposition in *Kildrummy*, *Henderson v Astwood* and *Grey v Ellison*, did not provide such support, not least because Lord MacNaughten did not state in *Henderson* that a man cannot contract with his nominee.

Lord Justice Millett also made the good point that if in this type of case the lease was void, it would be a potent instrument of fraud as there would be nothing on the face of the lease to indicate any defect to a potential mortgagee or underlessee.

In the circumstances, as he held that the leases were valid, in Lord Justice Millett's view the property which formed the subject matter of the gift, the freehold reversion subject to and with the benefit of the lease, was enjoyed to the entire exclusion of Lady Ingram.

Lord Justice Millett went on to state that even if the leases had been invalid, Lady Ingram was successful in excluding the leasehold interest from the subject matter of the gift as she took her leasehold interest without any participation from the donees. He stated that he was unable fully to accept the reasons by which the court reached its conclusion in the often quoted *obiter* passage of Goff J in *Nichols*, and that that case was distinguishable, as there the donee of the freehold reversion and the grantor of the lease were one and the same, whereas in the present case they were not.

Both Lord Justice Nourse and Lord Justice Millett held that the landlord's covenant for quite enjoyment did not bring the case within the second limb of section 102(1)(b).

Lord Justice Millett rejected the possibility that the principle enunciated in *Ramsay* could be applied to this case as Lady Ingram set out to make a genuine gift of a reversionary interest in her property to her children. Even if the broad purposive construction advocated in *IRC v McGuckian* [1997] 1 WLR 991 were applied, its end result was a gift of the freehold reversion.

The Way Forward

If the decision of the majority of the Court of Appeal stands in the House of Lords, to which leave to appeal has been given, those who have undertaken planning in an identical form to Lady Ingram will be in some difficulty.

However, much to the Revenue's dissatisfaction, the following variations, in the writer's view, subject to the particular circumstances of each case, may well be safe:

(i) A husband and wife as joint owners of a freehold property grant a lease to the wife beneficially and then gift the freehold reversion;

(ii) A person grants a lease to a settlement under which he is tenant for life and then gifts the freehold reversion;

(iii) A reversionary lease is gifted and the freehold reversion retained.

However, in the writer's view, the House of Lords will find Lord Justice Millett's principled and considered dissenting judgment unanswerable.