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LEASES TO NOMINEES

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The question whether it is possible to grant a lease to a nominee continues to be of interest to readers of this periodical. Many such leases have been granted in the course of arrangements for Inheritance Tax planning (or, depending on one's viewpoint, Inheritance Tax avoidance). The Revenue have maintained that such leases are void.

The purpose of this article is to consider the arguments in detail²; and to consider some older authorities. It will be submitted that the Revenue's position on this point is contrary to principle and authority.

Kildrummy

Leases to nominees are not new. They were, for instance, in common use before 1975 for the purposes of estate duty planning.³ (That is hardly surprising since the Estate Duty provision was the basis of Inheritance Tax.) Why, therefore, do the Revenue take a point that was not taken before? The answer is the Scottish case of *Kildrummy (Jersey) Ltd v IRC* [1990] STC 657 which held that a lease to a nominee is not possible under the law of Scotland.

We need not, however, spill much ink discussing the law of Scotland. A decision of the Scottish Courts, discussing the Scots law of landlord and tenant and the Scots law of trusts, has no more authority in England than a decision of the Courts of Timbucktoo, so different are our two systems in these areas. To be fair, the

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² The issue has already been clearly and concisely addressed in a letter published in this journal: see Volume 1 page 137 (David Rowell).

³ See [1962] BTR 1 and the 4th edition of *Potter & Monroe's Tax Planning* (1963).

Revenue have accepted this at least in some correspondence the author has seen.

Kildrummy is treated as an illustration of the argument on which the Revenue would rely, not as an authority of persuasive status in English law.

The argument of principle

Let us turn, therefore, to the Revenue argument of principle, which rests on two basic propositions:

- (1) A person cannot contract with himself.
- (2) A lease is "in one aspect contractual" and it follows that one cannot grant a lease to oneself.

This is correct: the House of Lords so held in *Rye v Rye* [1962] AC 496.

Next it is said that one cannot grant a lease to an agent for oneself. It is easy to see why this is so. If A is agent for B, and A enters into a contract with C on behalf of B, there exists a contract between B and C. If A is agent for B and enters into a contract with B on behalf of B, there would be a contract between B and B, which is not possible.

From this it is said that one cannot grant a lease to a nominee, there being no relevant difference between a nominee and an agent.

This is the key issue: is there is any difference between a nominee and an agency?

Now a nominee is a trustee; and all the textbooks regard the distinction between a trustee and an agent as fundamental to English Law.⁴ The difference is this:

- (1) An agent is a person who has authority to enter into contracts on behalf of his principal.
- (2) A nominee is a person who is compelled to deal with property over which he has control for the benefit of his beneficiary.

An agent is merely a channel for a contract between two other parties; a nominee is no such thing. It is important to stress that a nominee has an independent existence from his beneficiary. Nominees generally have all the statutory powers

⁴ See Underhill & Hayton, *Law of Trusts & Trustees*, 14th Edition, p 4; Snell, *Principles of Equity*, 29th Edition, p. 92.

of trustees⁵. They can, and indeed, must exercise them independently of the beneficiary. The beneficiary's only right is to call for a transfer of the trust property to himself. See *Re Brockbank* [1948] Ch 206.

There is another point. The question of what is a "nominee" justifies further thought. A nominee may have a lien over the trust fund: s.30 Trustee Act 1925. A nominee may also be entitled to charge, if the declaration of trust so provides. In either case there is not in a true sense a complete nominee ship. The nominee has some rights in the property. In these cases the argument that the nominee is the "same person" as the beneficial owner is plainly invalid.

The Revenue put the point another way: that there is "no substance" in a contract between a person and his nominee. One might respond that there is indeed some "substance" in a contract between a person and a nominee which does not exist in the case of a contract between the person and himself, namely:

- (a) The nominee's right (indeed duty) to manage the property.
- (b) The nominee's lien.
- (c) The nominee's power of sale.

More fundamentally, the investigation into the "substance" of the transaction is wrong in principle. The true reason that a contract between a person and himself is void is not that such a contract has no "substance". It is that such a contract has only one *party*, and so it cannot be sued on in the courts. The same person cannot be plaintiff and defendant. For the same reason, a contract between A and A & B jointly was void at common law. See *Ellis v Kerr* [1910] 1 Ch 529 at 537. A contract between a beneficiary and a nominee has two parties and can be sued on at law. (There is of course no question of suing on a contract in equity.)

It is easy to find consequences that flow from the Revenue's view which if not absurd are at least slightly odd:

- (1) Even if A cannot grant a lease to his nominee, A's nominee can acquire a lease granted by A to another person who is not a nominee; it seems strange that A cannot achieve in one step what can be achieved in two.
- (2) Suppose A grants a lease to a person who holds the lease on trust as to 99.9% for A and as to 0.1% for B. That person is not a nominee and the lease is valid. The distinction is, if not illogical, at least extremely arbitrary.

⁵ Except, curiously, the power to insure: s. 19(2) Trustee Act 1925.

- (3) Suppose A grants a lease to a nominee, which is, on the Revenue view, void. The nominee then sells the lease to X, a bona fide purchaser without notice. Plainly X has acquired a valid lease. How can a void lease be made valid by a transaction to which the landlord is not a party?

The Authorities

A number of authorities are relevant to the issue.

There is the well known comment of Lord Radcliffe in *Rye v Rye* which upholds the validity of a lease for a nominee. His comment has some persuasive value. It is of course not binding, since the point did not arise for decision and none of the other judges commented on the point.

The Revenue would dismiss Lord Radcliffe's view as a minority view. His view was indeed a minority one. He was the only member of the House of Lords to discuss the point. His view was not a minority view in the sense that the other judges disagreed with him. The other judges expressed no view, for the understandable reason that the point did not arise for decision. In short, Lord Radcliffe's comment does not bind the court, in our system of precedent, but it carries some weight.

The most important cases are a line of authorities culminating in *Boyce v Edbrooke* [1903] Ch 836, a decision of Farwell J. These all concern powers of leasing.

The law of powers was a subject of the greatest importance before 1925; it was the foundation of conveyancing. An enormous amount of law developed on the subject, much of which has become obsolete since 1925. The great textbooks on the subject, *Farwell on Powers* and *Sugden on Powers* are all pre 1925 and read like a foreign language to the contemporary lawyer. Yet here in the somewhat dim recesses of the history of land law, the answer to our question can be found.

A person with a power to grant a lease cannot grant a lease to himself. This flows from the basic rule that a lease, like any contract, must have two parties. However, such a person can grant a lease to a nominee for himself. This is made perfectly plain by numerous authorities both ancient and (relatively) modern.

Let us start with *Taylor v Horde* 1 Burr 60, 122 (1757) where it is said:

"It is no objection to a lease under a power that it is in trust for him who executes the power provided the legal tenant be bound, during the term, in all requisite covenants and conditions."

Farwell J comments:

"Assuming that it does decide that proposition and is not a mere dictum, it would merely be a decision that it was a perfectly good lease at law and I do not see, as at present advised, why it was not. ... It appears to me that all that was intended to be laid down was that it was a good lease at law."

The next case is *Wilson v Sewell*, 1 WB 624. This concerned a power of leasing under a private Act of Parliament of the 12th year of Charles II giving the Master of the Rolls for the time being power to lease certain premises in Rolls Yard. The Master of the Rolls, Sir Thomas Clarke, granted a lease to a trustee for himself. Clarke was Master of the Rolls 1754-1764. One might have thought that the Master of the Rolls would know whether it was possible to grant a lease to a nominee, but the lease was challenged.

Lord Mansfield said:

"How was the original contemporary exposition of this law? [that one could grant a lease to a nominee] Mr Verney's, I know, were in trust. [Verney was Master of the Rolls 1738-1741]... The practice of this office for 100 years accordingly is a sufficient justification."

There is one objection to a lease granted by a person with a power of leasing to a nominee. This is that the lease may sometimes breach the self dealing rule. Farwell J discussed the operation of the self dealing rule in this context⁶. Obviously, however, that particular difficulty does not apply where the lessor is the beneficial owner. What is plain is that *the fact that the contract is made between the lessor and the lessee as nominee of the lessor has never caused the English Courts the slightest concern.*

Conclusion

To conclude. Jessel MR, speaking of an earlier decision of which he disapproved, noted that:

"it was decided in the year 1853, which I need not say is rather a modern time to alter the law of real property".⁷

⁶ The issue is now resolved by section 68 Settled Land Act 1925.

⁷ *Re Macleay* (1875) LR 20 Eq. 186, cited in Megarry's *Miscellany at Law* (1955).

His comment seems apposite in the present context. Leases to nominees have been accepted without question in English law, at least from the time of Charles II. Is it not rather late in the day to question their validity now?