RYE v RYE RE-VISITED

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If it is to be certain that a lease will be effective to reduce the value of the reversion subject to it for fiscal (and other) purposes, it must be properly created and, as *Kildrummy*[2] recently demonstrated, where there is identity between the lessors and the lessees, this is more easily said than done. *Kildrummy* also demonstrated that Lord Radcliffe's supposition in *Rye v Rye* [1962] AC 496, at 511, that, if there was any conceivable point in the operation, a man could demise property to a nominee for himself was not correct, at any rate in Scottish Law. In *Rye v Rye* Lord Radcliffe was, of course, only concerned with the law of England and Wales.

Rye v Rye was concerned with whether two brothers, who were in partnership as solicitors, had validly granted themselves an annual tenancy of freehold premises, which they owned as tenants in common in equal shares, by agreeing that their solicitors' practice should be transferred to the premises and that the partnership should be debited with £500 a year as rent. There was point in the operation in that, whereas they were entitled to the profits of the partnership in unequal shares, they were entitled to the rent in equal shares.

There were held to be two questions for decision in the case. The first was whether it was competent in law for the two brothers orally to grant themselves an annual tenancy of the premises of which they were the owners. The second was whether, if so, an annual tenancy of the premises had, in fact, been granted by the two brothers to themselves.

As so often happens, the judge at first instance answered the two questions `yes'; the Court of Appeal answered the first question `yes' and the second question `no'; and the House of Lords answered the first question `no' and the second question `yes'. Only the answers of the House of Lords to the questions are, of course, of importance for present purposes, and only the first question and their answer to it are of general importance.
The first question was thought to turn on the interpretation of LPA 1925 s.72(3) and (4), but their Lordships had no difficulty in finding that s.72(4) was irrelevant. The subsection provided that (subject to a proviso which was irrelevant in *Rye v Rye* and

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2 *Kildrummy (Jersey) Ltd v IRC* [1990] STC 657 CS.

as to which see below) two or more persons (whether or not being trustees or personal representatives) might convey, and should be deemed always to have been capable of conveying, any property vested in them to any one or more of themselves in like manner as they could have conveyed such property to a third party. Their Lordships considered that this provision simply meant, in effect, that A, B and C could convey property vested in them to any one or two of themselves or, in other words, that `more' in s.72(4) did not include `all'. S. 72(3) was, their Lordships considered, the relevant provision. Not only did it expressly provide that after the commencement of LPA 1925 a person might convey land to or vest land in himself but, since the rule of the Interpretation Act that the singular included the plural applied, it also provided that after the commencement of the Act two or more persons might convey land to or vest land in themselves. LPA 1925 s.205(1)(ii) was also relevant because it provided that "convey" in the Act had a corresponding meaning to that assigned by the provision to "conveyance", and s.205(1)(ii) provided that, unless the context otherwise required, "conveyance" included a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any *instrument*, except a will.

As indicated above, all the Law Lords decided that it was not competent in law for the two brothers orally to grant themselves an annual tenancy of the premises of which they were the owners, but they did not all give the same reasons for so deciding.

Viscount Simonds' primary reason for so deciding was that it was not possible for one person to contract with himself or two or more persons to contract with themselves, but he also considered that, if persons were to convey land by granting a tenancy, the grant must, by reason of the definition of "conveyance" at s.205(1)(ii), be by an instrument in writing (see [1962] AC at 503-506).

Lord Reid (see ibid at 509) agreed with Lord Simonds.

Lord MacDermott (see 506-509) came to the conclusion that the brothers, by letting the premises to themselves orally, did not convey them for the purposes of s.72(3) where, by reason of the definition of "conveyance" and "convey" at s.205(1)(ii), the word `convey' imported the requirement of an instrument in writing, but he expressed no opinion on the question whether, had the letting been a conveyance, it would have been validated by s.72(3).

Lord Radcliffe (see 510-513) thought that nothing in LPA 1925 removed the difficulty of a person not being able to contract with himself but that two or more persons might be able to contract with themselves if each single person covenanted separately with himself and the other or others. However, he considered that the word "convey" in s.72(3) had to be construed in accordance with s.205(1)(ii); that when so construed, it required a written instrument; and that for that reason alone s.72(3) did not serve to validate the brothers' oral grant of the tenancy of the premises to themselves.

Lord Denning (see 513-515) said that at common law it was impossible for one person to grant a tenancy to himself or two persons to grant a tenancy to themselves because one person could not contract or covenant with himself and two persons could not contract or covenant with themselves, and he considered that LPA 1925 had not changed the law in this respect but only in that, under s.72(4), two persons could by writing grant a tenancy to one of themselves. For these reasons he concluded that the brothers had not granted a tenancy to themselves at all.

Rye v Rye is widely, and rightly, remembered as authority for the propositions that a person cannot grant a tenancy to himself and that two or more persons cannot grant a tenancy to themselves, and accordingly a person who wishes, or persons who wish, to grant such a tenancy will commonly avoid the decision by bringing another person into the transaction as an extra tenant so that, for example, one person grants a tenancy to a partnership of himself and another or two persons grant a tenancy to a partnership of themselves and a third person.

If two or more persons want to grant a tenancy to one or more, but not all, of their number, there is, in general, no difficulty about carrying out the transaction since *Rye v Rye* made it plain that a transaction of this kind could be carried out under LPA 1925 s.72(4), subject to the proviso to that subsection, under which, if the persons in whose favour the grant is made are, by reason of any fiduciary relationship or otherwise, precluded from validly carrying out the transaction, the grant is liable to be set aside.

However, it is less often remembered that in *Rye v Rye* the word `convey' in LPA 1925 s.72(3) was construed as denoting, in relation to the creation of a tenancy, a grant of a tenancy in writing, and that it follows from the decision in *Rye v Rye* - and indeed seems to have been expressly decided by *Rye v Rye* (see [1962] AC at 504 per Lord Simonds, at 506 per Lord MacDermott and at 513-514 per Lord Denning) - that the word `convey' in s.72(4), in relation to the creation of a tenancy, has the same meaning. It sometimes, therefore, happens that two or more persons who are co-owners of land grant a tenancy of the land to one or more of themselves orally and expect the tenancy to be effective under s.72(4), inter alia, to depress the value of the reversion for fiscal purposes. In certain circumstances it may be. For example, the defective tenancy may take effect as a licence to occupy land for use as agricultural land and the licence may be converted into a tenancy by Agricultural Holdings Act 1986, s.2. But often the tenancy will be ineffective for all purposes.

In these circumstances practitioners anxious to see that their tax planning in the *Rye v Rye* area does not go awry would be well-advised to trespass into the area of the conveyancer and make sure that it is well and truly appreciated that the tenancy to be granted by the owner or co-owners must be granted by writing.