LETTERS TO THE EDITORS

From Miss M.C.B. Syed
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Dear Sirs,

Rye v Rye *Revisited*

I was interested to read Hilda Wilson's article on *Rye v Rye* and the ability of a person to contract with himself.

An interesting application of this rule can be found where one has two settlements, the trustees of which are the same persons (as will quite commonly happen in the case of landed estates). On the basis that, as a set of trustees is not a legal entity that can enter into contracts, it is the trustees personally who are, together, a contracting party, it would seem to follow that the two trusts cannot, for example, farm in partnership with each other. Similarly, as trustees of one trust they could not enter into a contract with a third party and then agree with themselves, as trustees of the other trust, that some of the benefits of the contract with the third party would be passed to the second trust in return for remuneration.

Of course, in their dealings with trustees of any other trust (where there is no common trusteeship) the trustees can do these things in their capacity as trustees of one trust alone, and can limit their liability in a valid and enforceable manner to the value of assets held by them in their capacity as trustees of that trust.

I would be interested to know whether any of your other readers have come across this problem in practice and, if so, how it has been resolved. It seems curious that the singular nature of the trust (which would, in any event require "renewal" of a contract each time a trustee retires) could result in some contracts being void *ab initio.*

Yours faithfully

Catriona Syed

From David Rowell Esq
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Dear Sirs,

I have read with great interest the first issue of the Personal Tax Planning Review and in particular the article on *Rye v Rye* (1962) A.C.496. It mentions that the decision of the Court of Session in *Kildrummy (Jersey) Ltd v IRC* (1990) S.T.C. 657 shows that Lord Radcliffe's supposition that a man can demise property to a nominee for himself is not correct in Scottish law but does not deal with the important question whether that applies also in England. I would suggest that it is most unlikely that an English court would follow Kildrummy.

First, a dictum by a Chancery lawyer of Lord Radcliffe's eminence would surely carry as much weight in England as a decision of a Scottish Court in which *Rye v Rye* is not even mentioned.

Secondly, the concept of a trust in Scotland is fundamentally different from that in England. On this I cannot do better than to quote from Walker's "Principals of Scottish Private Law" 4th Edition Vol. IV at p.3-4:-

> "In England the trust concept has been developed to a high degree over a long period in the Court of Chancery and the Chancery Division. The concept is of concurrent ownership, the trustee having nominal and formal ownership recognised at law, but the beneficiary having a concurrent ownership recognised and enforceable only in equity. Scottish trust law, though an indigenous development, has borrowed much from English principles, but it does not regard the trust as an instance of concurrent legal and equitable ownership but rather of legal ownership qualified by the rights of parties having *jura crediti* against the subjects owned".

Scottish law therefore lacks the concept of separate legal and equitable ownership of the same property which is basic to the English idea of a trust. Walker also says (at p.3) that "the older Scottish authorities treat trust as a branch of mandate or of deposit or of a combination of these" though he goes on to give reasons for regarding it as a relationship *sui generis*. That is why the Lord President says in *Kildrummy* (1990) S.T.C. 657 at 662 that it does not matter whether one regards nomineeship as a kind of trust or as an example of the contract of agency. If one approaches the situation by regarding the nominee as a sort of agent for the beneficiary then, if the same person is both landlord and beneficiary, it is natural to see the lease as a contract by that person with himself. A man cannot contract with himself merely by interposing an agent. However such an analysis of the situation is quite alien to English law.

Thirdly, this point is reinforced by a consideration of English legal history. Prior to 1875 when the Judicature Act 1873 came into force, there were, in England, common law courts recognising only legal (as distinct from equitable) ownership and unable to give effect to trusts or equitable interests and the Court of Chancery which enforced trusts but was unable to disregard the common law courts' decisions as to legal ownership. If the common law courts regarded X as the legal owner of land the Court of Chancery had to accept his legal ownership. All it could do, if Y was the owner in equity, was to compel X to convey the land to him or to account to him for

the profits from it.

So if in 1874 B had granted a reversionary lease to A who declared that he held it on trust for B (as happened in *Kildrummy*) the common law courts would have treated A as the tenant owning the lease and ignored B's rights. "The Chancellor does not and cannot in those circumstances hold that B is the owner. A's right at law is undoubted, and the Chancellor cannot change the law. What the Chancellor does is to issue an order to A either to convey the land to B, or to refrain from action interfering with B's right as the case may be". (See *Hanbury & Maudsley* "Modern Equity" 13th Edition p.7). Neither court could have treated the transaction as a nullity.

This may be illustrated in two situations:-

(a) A sells the lease to a bona fide purchaser without notice of the declaration of trust, which he may do, since no indication of the trust appears on the title shown to a purchaser. The common law courts treat the purchaser as owner since A's right to the lease at law is unquestionable and he can therefore pass legal ownership by his conveyance. The Court of Chancery also has to recognise the purchaser as owner since it can do nothing against a purchaser of a legal estate for value and without notice. All it can do is make A pay B the proceeds of sale if A is solvent or the proceeds remain identifiable.

(b) A sues a sub-tenant for the rent. He wins since he is undoubtedly entitled to the reversionary lease at law. B can neither sue nor distrain for the rent either at law or in equity for the Court of Chancery has to respect A's legal ownership. Nor is B entitled to the rent once A has recovered it since his right in equity is only to an account of the net profits from the lease after A has deducted his expenses. *Schalit v Joseph Nadler* (1933) 2 K.B. 79 shows the position of a nominee holding a head lease being analysed in this way after 1875.

The Judicature Act 1873 did not change this position. It provided for common law and equity to be administered in the same courts but did not change the substantive law in any relevant respect. Indeed it provided expressly for the Courts to take notice of all equitable estates "in the same manner in which the Court of Chancery would have recognised and taken notice of the same" and, subject thereto, to recognise and give effect to "all estates, titles, rights [etc.] existing by common law .... in the same manner as the same would have been recognised and given effect to if this Act had not been passed". (See s.24 (4) and (6) thereof). Accordingly since prior to 1875 a man could have granted a lease to his own nominee and since the 1873 Act contained nothing to prevent him, anyone suggesting that such a transaction would be a nullity today needs to explain at what time and in what way the law has been changed.

Admittedly history cannot confine the development of the modern law but what reason is there for a judge to treat as a nullity a transaction entered into for a sensible commercial purpose which would undoubtedly have been valid a century ago?

While one can understand the Scottish Courts baulking at the idea of a man granting a lease to his own nominee, his ability to do so in England is one of the curiosities inherited from the historical separation of the courts of law and equity.

Yours faithfully

David Rowell