

In any event, where the Basic Law is found to prevail over an inconsistent national law, the effect normally would not be that the national law is 'null and void,' but only that the national law is inoperative in the particular case in question. To declare a national law null and void would not only unduly flout the legislative authority of the NPC, but also nullify all rights, statuses, and relationships arising from that national law. That would have an impact well beyond Hong Kong's boundaries and could be seen as an intolerable encroachment upon the reserved authority of the central government.

In conclusion, the Court of Final Appeal's judgment in the right of abode cases seems to have raised more constitutional questions than it has resolved. It is important that the controversies should not be so politicised as to upset sound legal reasoning and judgment. Those constitutional questions need to be studied dispassionately and critically by legal professionals and reconsidered by the court on the next appropriate occasion.

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Appropriation Set Aside: 'A Short Point of Law — But an Interesting One'

Introduction

It is one of the dynamic characteristics of our discipline that however well we think we know the law within our specialisations there is always the challenge of a reappraisal of an accepted view. For practitioners there is the additional salutary reminder of the importance of ensuring that things done, or permitted to be done, are done strictly in accordance with law and with due formality. One such example recently struck the writer, arising from the decision of Sir Richard Scott VC in *Kane v Radley-Kane*,¹ concerned with what was described by the Vice-Chancellor as 'a short point of law, but I think rather an interesting one.'² The case centered on the common-place area of appropriation³ of assets in the administration of deceaseds' estates in satisfaction of testamentary or intestate benefits. Such a process is an important feature of Hong Kong probate

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¹ [1998] 3 All ER 753 (hereinafter referred to as *Kane*).

² *Ibid*, p 754. The Vice-Chancellor seemed to consider the precise point in question a novel one.

³ In the sense of 'set aside or devote for a purpose' — hence 'Appropriation Bill.' See also the right to appropriate personal chattels which was a feature of the original Intestates' Estates Ordinance, s 7 (now repealed by the Intestates' Estates (Amendment) Ordinance (No 57 of 1995) with effect from 3 November 1995 and replaced by an absolute right to the personal chattels, as newly defined; see ss 2 and 4).

practice and is invoked expressly or impliedly in the administration of a great many, perhaps the majority of, deceased estates. The point has only once briefly been visited by the Hong Kong courts, in the judgment of Simon Li J in *Madam Lam Kwan-shi v Lam Wan-hing*⁴ where the matter was referred to in a very short and general way. The recent English decision considers the point in question in a more detailed and far-reaching way, providing a timely opportunity to review the matter.

Appropriation of assets

Prior to the decision in *Kane* it is probably true to say that it was thought, or at least assumed, that a sole personal representative could appropriate personal assets in a deceased's estate in satisfaction of his or her own beneficial interest in the estate, *Re Richardson, Morgan v Richardson*⁵ being usually cited in support. The decision in *Kane* now suggests that this view is not generally correct, at least in respect of an appropriation by a sole personal representative of personal property which is not cash or the equivalent of cash, where the appropriation is made in satisfaction of that person's own pecuniary legacy, including the statutory legacy payable to a spouse on intestacy. The Vice-Chancellor held invalid an appropriation by a sole personal representative of shares in a private company, in satisfaction of her entitlement (as spouse) to the statutory legacy payable on intestacy. The appropriation was successfully challenged by another beneficiary of the estate after it was shown that the shares, valued for probate at £50,000, had been sold some two years later for £1,131,438.⁶ The Vice-Chancellor's decision was summarised in the following passage:

⁴ [1967] HKLR 616.

⁵ [1896] 1 Ch 512. See eg the citation in *Halsbury's Laws of Hong Kong*, Vol 27: *Wills, Probate, Administration and Succession* (Hong Kong: Butterworths, 1998), para 425.841. Parry and Clark, *The Law of Succession* (London: Sweet and Maxwell, 10th ed 1996), p 476 n 59, states categorically: 'At common law executors may appropriate to one of themselves, *Re Richardson* [1896] 1 Ch 512, and an administrator may appropriate to himself, *Barclay v Owen* (1889) 60 LT 220.' However that text (at p 477 n 69) does also cite *Re Bythway* (1911) 104 LT 411 for the proposition 'executrix not entitled to appropriate to herself unquoted company shares at her own valuation.' These comments both represent the accepted previous view of the matter and reflect some of the inconsistency in the previous case law.

⁶ An appropriation is intended to be in substitution or satisfaction of the beneficiaries' interest or entitlement under the will and must not be a greater or a lesser benefit. Thus there are provisions in s 41(3)/68(4) for valuation of the respective parts of the estate which includes the duty to employ a duly qualified valuer for that purpose. The valuation of the property appropriated should be at the date of appropriation: see *Re Charteris* [1917] 2 Ch 379 and *Re Collins* [1975] 1 WLR 309. If the valuation and the appropriation have been properly made then the appropriatee takes the property in specie and enjoys or suffers, as the case may be, any increase or decrease in value of the property subsequent to the appropriation; see Parry and Clark (note 5 above), p 476, citing *Ballard v Marsden* (1880) 14 Ch D 374, 376, *Re Richardson* (note 5 above), and *Re Marquis of Abergavenny's Estate Act Trusts* [1981] 1 WLR 843, 846.

Just as a personal representative can satisfy his own legacy, or his own debt for that matter, by a payment of cash, so perhaps there need be no objection to a personal representative satisfying his own legacy by a payment of cash or of assets which are equivalent to cash. But there is, in my judgment, every objection to a personal representative satisfying his or her debt or his or her legacy by taking in specie assets which are not the equivalent of cash, and unquoted investments are not the equivalent of cash.⁷

Thirty years earlier Simon Li J, in the *Madam Lam* case, had come to much the same basic conclusion, although without any discussion of principle or citation of authority; the judge commented: 'I am of the opinion that the plaintiff is not entitled to appropriate property to herself without sanction of other beneficiaries. She cannot sanction her agent to appropriate trust property without a good cause which is not apparent at the present stage.'⁸

The decision in *Kane* is important because it was based, not on an interpretation of the relevant English statutory provision (s 41 of the Administration of Estates Act 1925⁹) which might limit the impact of the decision to a question of specific statutory interpretation, but on the general application of the principle of equity known as the self-dealing rule. The Vice-Chancellor held that the self-dealing rule applied to appropriations as it does to sales and the application of the rule rendered the appropriation voidable at the instance of any beneficiary of the estate, and, being so challenged, it was declared invalid. The self-dealing rule applies with equal force in Hong Kong, as illustrated in *Tang Ying-ki v Maxtime Transportations Ltd.*¹⁰ Thus the decision could have considerable impact since in many estates there will be only one personal representative who, being typically the administrator of an intestate estate or the administrator with the will annexed of testate or partially testate estate, will also be the principal beneficiary (or one of them). Such a person, say a spouse, will often impliedly appropriate personalty assets to themselves in satisfaction of their beneficial interests under the intestacy or the will. Often in cases involving personalty, no formality will be utilised; an implied appropriation will be executed by an implied assent. But if this process — appropriation by a sole personal representative in favour of him/herself (at least in satisfaction of a legacy) — is now stated to be wrong then the appropriation,

⁷ Note 1 above, p 763.

⁸ Note 4 above, p 619. The case centred mainly on the power to appoint an agent under s 25(1) of the (then) Trustee Ordinance and is a decision before the enactment of the current power of appropriation contained in s 68 of the Probate and Administration Ordinance, which is the basis of the discussion in this article.

⁹ Section 41 of the English Act corresponds with s 68 of the Probate and Administration Ordinance which is in very similar terms; hence the reference in this article to 's 41/68.' The Administration of Estates Act 1925 extends to England and Wales and is referred to shortly in this article as the 'English Act.' The decision in *Kane* is mainly centred on the common law position arising from case law, which is, of course, equally applicable in Hong Kong. Insofar as the decision is concerned with the provisions of the English Act, it is submitted that it is equally applicable to the Hong Kong provisions.

¹⁰ [1996] 3 HKC 257.

and thus the title to the appropriated asset, is at least voidable at the instance of any person interested in the estate.

Such a conclusion with reference to movable property may cause some concern to probate practitioners. Moreover, the question arises whether the decision can apply with equal logic to an appropriation of immovable property, such as a flat. If so, then conveyancing problems may arise. Whether the transfer (the assent) is formal or informal, if the appropriation is invalid it will cause problems of title on subsequent sale of the appropriated asset by the appropriatee to a third party purchaser which may be raised by requisition. If *Kane* applies to such a situation, the requisition will be good and may result in a fundamental title defect. As Le Pichon J pointed out in *Tang Ying-ki v Maxtime Transportation Ltd* (in a different context but where the self-dealing rule was held to apply):

The property may be virtually unmarketable thereafter. The liability to have a sale set aside affects subsequent purchasers with notice. Consequently, in those cases it is almost impossible to sell land where the title shows that the vendor formerly held as a trustee. Even in the context of the self-dealing rule, it is recognised that only in most extraordinary circumstances will the court refuse to set aside a purchase of trust property by a trustee at the instance of the beneficiary, other than in a case where the trustee had successfully raised against the beneficiary the defence of delay or laches.¹¹

Sources and nature of the power of appropriation

The power of appropriation has, it is suggested, always been part of the inherent powers of personal representatives,¹² being analogous to the power of sale of assets, and was recognised as such by the Vice-Chancellor in *Kane*.¹³ The power is now essentially embodied in statute. The power of appropriation received statutory formulation as s 41 of the English Administration of Estates Act 1925, which has been copied, more or less verbatim, into s 68 of the Probate and Administration Ordinance.¹⁴ Some of the essential characteristics of these

¹¹ *Ibid*, p 264 (citing *Tito v Waddell (No 2)* [1977] 3 All ER 129, 240-1).

¹² But see Parry and Clark (note 5 above), p 475: 'Prior to 1926 a personal representative had no adequate power to appropriate assets so as to be entitled (for instance) to make an appropriation to satisfy a vested pecuniary legacy given to an infant.' The statutory provisions in s 41/68 now enlarge the power by providing machinery for providing the necessary consent in such cases; see note 18 below.

¹³ 'It is important, in my judgment, that the reasoning underlying this non-statutory power of appropriation, which it was held personal representatives had and could exercise, was based upon the analogy with sale': the Vice-Chancellor, in *Kane* (note 1 above), p 763, citing the Court of Appeal's decision in *Re Lepine, Dowsett v Culver* (1892) 1 Ch 210, a decision before the 1925 statutory formulation.

¹⁴ The statutory provisions quoted from and referred to in this paragraph are the same in both the English Act and the Hong Kong Ordinance; hence s 41/68. For convenience and relevance to Hong Kong law, s 68 of the Probate and Administration Ordinance will be cited here.

provisions can be highlighted. The power of appropriation is stated boldly in sub-s (1): '[T]he personal representative may appropriate ...'¹⁵ It will be noticed that the power is permissive and conferred in the singular and this is consistent with the general principle that where there are several representatives the powers of all may, in the absence of any direction to the contrary in the will or grant of administration, be exercised by any one of them.¹⁶ Other provisions of the ordinance which confer powers, for example the immediately preceding three sections, are also expressed in the singular.¹⁷

The rest of the section is concerned with setting out in unusual length and detail (s 68 is one of the longest and most detailed provisions of the ordinance) the rules and procedures governing the exercise of the power.¹⁸ But despite this length and detail the section does not contain any specific reference to the 'self-dealing rule' or any specific provisions relating to the exercise of the power by a sole personal representative in favour of his or her self.¹⁹ There is the somewhat vague reference in sub-s (6) to the effect that: 'The personal representatives shall, in making the appropriation, have regard to the rights of any person who ... [not relevant to this point] ... and of any other person whose consent is not required by this section.'²⁰ But this is counteracted by the reference in sub-s (5): 'An appropriation made pursuant to this section shall bind all persons interested in the property of the deceased whose consent is not hereby made requisite.'

Sections 41 and 68 do not stand alone. The power to appropriate has received specific enlargement into a right to appropriate the matrimonial home on intestacy. This second statutory source (which is based on the former power) has a much more recent pedigree, having been introduced into English law in

¹⁵ Parry and Clark (note 5 above), p 476, characterise the statutory provision as 'a wide power' and note that it applies whenever the deceased died and to both testate and intestate estates. It also applies, as will be apparent, to both immovable and movable property (real and personal property in the English Act). The right to require an appropriation of the 'matrimonial home' on intestacy in the Second Schedule (to both the 1952 Act and the ordinance) is in addition to, not in substitution of, the general power in s 41/68.

¹⁶ s 54(3). The restriction in sub-s (1), and to sub-s (2) on the power of sale, is not relevant here. As a general principle personal representatives have power to act jointly and severally: see *Fountain Forestry Ltd v Edwards* [1975] Ch 1 and *Attenborough v Solomon* [1913] AC 76. This point might have some significance to this discussion since it is clear that the section empowers a sole personal representative to exercise the power (in appropriate cases).

¹⁷ 'Personal representative' is only defined in the singular in s 2 of the ordinance, but will apply to the plural form where there are more than one.

¹⁸ These include rules relating to the obtaining of the required consent to an appropriation (s 68(2)), valuation (s 68(4)), and protection of purchasers (s 68(8), (9)).

¹⁹ This is in striking contrast to the right conferred by the Second Schedule which does expressly contain an implicit reference to the self-dealing rule, a point noted in Scott VC's judgment in *Kane* (note 1 above), p 764, although the case was not concerned with that legislation. See also s 55 of the ordinance which is referred to below in note 34.

²⁰ A further provision can be noted: s 68(2)(b)(ii) states that, in the case of a settled interest, the consent of the trustee, 'not being also the personal representative,' is required. See also a similar reference in para (e): 'independently of the personal representative.' This suggests that the section is concerned to ensure that the personal representative cannot in effect consent to himself where he is both trustee and personal representative.

1952 by the Intestates' Estates Act 1952 which created the right and set out the governing rules in a new schedule, the Second Schedule.²¹ This provision has been copied into Hong Kong law by the Intestates' Estates (Amendment) Ordinance 1995 as s 7 and Schedule 2 of the Intestates' Estates Ordinance.²² It can be noted that this right is limited to: intestacy; the surviving spouse; and the matrimonial home.

One aspect of the Second Schedule relevant to this discussion must be noted. Paragraph 5 of that provision states: 'Where the surviving husband or wife is one of 2 or more personal representatives, the rule that a trustee may not be a purchaser of trust property shall not prevent the surviving husband or wife from purchasing the residence in accordance with this Schedule.' This is an implicit reference to the self-dealing rule and it can hardly be argued that it does not provide authority for the converse proposition that if the spouse is the sole personal representative, then the self-dealing rule does apply to negate the right conferred by the schedule. Further, this provision lends statutory support to the general proposition that the self-dealing rule does apply to personal representatives. The next progression is tempting; therefore, applying the principle by analogy, it can be argued that the self-dealing rule must apply to the exercise of the power of appropriation in s 41/68, so that the power conferred by that section likewise cannot be exercised in favour of him/herself by a sole personal representative. There is undoubted force in this argument but the questions must be asked whether this necessarily follows and whether it is supported by the case-law.

Application of the statutory provisions

The dichotomy between these two statutory sources of appropriation must be emphasised; the former is a general power; the latter a specifically limited right. Where the appropriation is effected by the sole personal representative, which for the purpose of this analysis will be assumed to be the surviving spouse, then the following situations must be differentiated.

(1) *Intestate estate — whether total or partial*

- (a) Appropriation of 'matrimonial home.' This is subject to the Second Schedule and it seems clear (from para 5, quoted above) that a spouse who is sole personal representative cannot

²¹ This right remains in English law as the Second Schedule to the 1952 Intestates' Estates Act and has not been incorporated into the general statutory provisions governing intestacy — in contrast to the Hong Kong legislation, where the provision is assimilated into the Intestates' Estates Ordinance as the Second Schedule.

²² The provisions in the Hong Kong schedule are in very similar terms to those of the English schedule and comments on the former apply with equal force to the latter.

appropriate the matrimonial home in his or her own favour. The right can be invoked only where the spouse is one of two or more personal representatives.

- (b) Appropriation of personal property which can only be done under the power in s 41/68. This requires further sub-divisions:
 - (i) appropriation in satisfaction of entitlement to residue; this, on the authority of pre-1925 cases, can, it seems, be validly done;
 - (ii) appropriation of property which is not cash or equivalent to cash, in satisfaction of statutory legacy; this is subject to *Kane* and is, on the authority of that case, invalid;
 - (iii) appropriation of cash or equivalent to cash in satisfaction of the statutory legacy; this is accepted as valid by *Kane*.

(2) *Testate estate*

- (a) Appropriation of real or personal property in satisfaction of residue (but not of a share of residue); this is subject to the power in s 41/68 and, on old case-law, is, it seems, valid.
- (b) Appropriation of property other than cash or equivalent to cash, in satisfaction of legacy; this is invalid by analogy with the decision in *Kane*.

(3) *Non-spouse the personal representative*

- (a) Where the sole personal representative is not the spouse then the only source of appropriation is the power in s 41/68 which applies to both testate and intestate estates and to both movable and immovable property.
- (b) The analysis above in paras 1(b) and 2(a) and (b) should be applicable.

The self-dealing rule

Bearing those statutory bases for appropriation in mind and before detailed consideration of the decision in *Kane*, it is instructive to examine briefly the self-dealing rule.²³ The rule derives from the fundamental fiduciary position and duty of a trustee or personal representative not to put herself in a position where her own interest conflicts with those to whom she owes the fiduciary

²³ Contrast the analogous fair-dealing rule, which can also be found in *Tito v Waddell (No 2)* [1977] 3 All ER 129, 240-1, which enables a beneficiary to set aside (for cause) a transaction where the trustee purchases the beneficial interest of any of his beneficiaries.

duty. The beneficiaries are entitled to look to the fiduciary to protect their interests not her own. Lord Eldon in *Ex p Lacey*²⁴ expressed the underlying policy for the rule in terms of the conflict of interest where the fiduciary is both the vendor and the purchaser in the same transaction. In contrast to the fair-dealing rule it is an absolute rule and does not depend upon whether the fiduciary acted fairly.²⁵ As the Vice-Chancellor commented in *Kane*²⁶ 'it is a general and highly salutary principle of law that a trustee cannot validly contract with himself and cannot exercise his trust powers to his own advantage.' The general principles of fiduciary relationships are both too extensive and too well documented to require further general exposition here.²⁷ (For recent Hong Kong cases see *Chinese United Establishments Ltd v Cheung Siu-ki*²⁸ and *Kishimoto Sangyo Co Ltd v Akihiro Oba*.²⁹) This discussion will focus on the self-dealing rule, a convenient statement of which can be found in the celebrated decision in *Tito v Waddell (No 2)*: 'The self-dealing rule is (to put it very shortly) that if a trustee sells the trust property to himself, the sale is voidable by any beneficiary *ex debito justitiae*, however fair the transaction.'³⁰

The same principle is stated more fully in Underhill and Hayton, *Law Relating to Trusts and Trustees*,³¹ which was cited by Scott VC in *Kane*:

A disposition of trust property to a trustee is automatically voidable by a beneficiary *ex debito justitiae*, however fair the transaction may be (the 'self-dealing' rule) unless (a) under an express or necessarily implied power in the settlement; or (b) by leave of a competent court; or (c) under a contract or option made before the fiduciary relationship arose; or (d) ... [repealed] ... or (e) the beneficiary acquiesced in the transaction; or (f) very exceptional circumstances.³²

The rule, which is expressed with reference to sale and purchase of property, has been held to apply as such to personal representatives.³³ The Probate and Administration Ordinance in effect confirms this but only with reference to a purchase by the personal representative of the property of the deceased, stating

²⁴ (1802) 6 Ves 625; cited as the rationale of the self-dealing rule by Le Pichon J in *Tang Ying-ki v Maxitime Transportation Ltd* (note 10 above), p 264.

²⁵ See note 23 above.

²⁶ Note 1 above, p 757.

²⁷ See, most recently, the discussion in Christopher H Sherrin, 'Solicitors' Liability for Breach of Trust and Breach of Fiduciary Duty' in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong: Hong Kong Law Journal Ltd, 1998), pp 118-40.

²⁸ [1997] 2 HKC 212.

²⁹ [1996] 1 HKLR 196.

³⁰ [1977] 3 All ER 129, 240-1, applied in *Tang Ying-ki v Maxitime Transportation Ltd* (note 10 above), p 264 (applying the principle to a sale by a mortgagee to himself).

³¹ (London: Butterworths, 15th ed 1995), p 647.

³² Note 1 above, p 757.

³³ See eg *Holder v Holder* [1968] Ch 353, where the sometimes harsh application of the rule was criticised.

that such purchases are voidable at the instance of any other person interested in the property sold.³⁴ Similarly in *Kane* the Vice-Chancellor stated that he was of the opinion that the self-dealing rule did apply to personal representatives as it applies to trustees — unless one or other of the exceptions set out in *Underhill and Hayton*, above, applies.³⁵ This is developed into a comment that the basic conflict principle applies to a personal representative purporting to appropriate shares in a private company to herself in or towards satisfaction of the statutory legacy to which she is entitled under the intestacy. The Vice-Chancellor commented that as such the personal representative/beneficiary 'was effecting a transaction in which her duty and interest were in conflict.'³⁶

The fiduciary position of personal representatives

It is however instructive to examine these propositions more critically and to consider whether the requirements of principle or precedent demand that the rule should apply to appropriations (as opposed to sale and purchase) by personal representatives in favour of themselves. The formulations of the self-dealing rule are always with reference to sale and usually with reference to trustees, and the justification for applying the rule to appropriations by personal representatives is based on the dual analogies of personal representatives to trustees and of appropriations to sales. To consider the former: certainly a personal representative is in a fiduciary position vis-à-vis the assets of the estate vested in her and the beneficiaries can be said to look to the personal representative to protect their interests. But a personal representative is not a trustee³⁷ and her fiduciary duties are different from, and more complex than, those of a trustee. The overall duty of a personal representative is to the proper administration of the estate which involves duties to the government in respect of taxes, duty to the creditors in respect of debts, and duty to the beneficiaries in respect of the beneficial interests arising under the will or the intestacy. The primary duty is to properly administer the estate and to that end personal representatives have comprehensive statutory or implicit powers to act, two of which are to sell and to appropriate, and both of these, so long as they are properly exercised, can be regarded as more or less unfettered powers.³⁸ The Vice-Chancellor expressed the duty as follows:

³⁴ See s 55, a provision which has no correspondence in the English Acts. The section makes no reference to appropriations and s 68 is not expressly made subject to the section; see note 56 below.

³⁵ 'But no one would suggest that trustees or personal representatives were at liberty to sell trust assets to themselves without either the sanction of the court or the consent of the beneficiaries, or reliance on some power in the settlement or will which authorised them to do so': *Kane* (note 1 above), p 763.

³⁶ *Ibid*, p 757.

³⁷ See Christopher H Sherrin, 'Aut Ovis Aut Capra: Personal Representative or Trustee?' (1995) 25 HKLJ 239.

³⁸ Kay J in *Barclay v Owen* (1889) 60 LT 220, 222 cited *Williams on Executors*: 'It is stated over and over again that an executor has absolute dominion over the estate for the purposes of distribution; and to say that he is bound to come to an agreement with the residuary legatee or to sell the estate and divide the purchase money is a proposition with which it is impossible to concur. Of course he must do it fairly, but if done fairly nothing can be said about it.'

It was her duty as personal representative, owed to the other beneficiaries in the intestate estate, that is to say, to the other three sons, to realise the assets of the estate as advantageously as she properly could, and not to apply a greater part of those assets towards payment or discharge of any liability or charge payable out of the estate than was necessary for that purpose.³⁹

A further point can be made: whereas a trustee is rarely a beneficiary under the trust which she administers (although of course she can be), a personal representative is frequently a beneficiary of the estate she administers.⁴⁰ This could be said to highlight the potential for conflict of interest since the dichotomy between the fiduciary holder of the property and the beneficiaries can be much less distinct in the administration of a deceased's estate than in the administration of trusts. To avoid allegations of self-advantage in the exercise of powers of sale or of appropriation the underlying point should be a proper price or valuation of the property sold or appropriated. If this is the crucial consideration, and support for this is afforded by the admission that cash or property equivalent to cash can be appropriated, then the self-dealing rule should arguably be formulated in qualified not absolute terms. There are practical advantages in permitting a personal representative to appropriate an asset in her own favour. Suppose that a beneficiary/personal representative wants an asset in the testator's estate; the personal representative can sell the asset and then appropriate the cash in satisfaction of a beneficial interest — including her own. Thus the 'personal representative' (whether sole or joint) can sell the asset and the 'beneficiary' can wait until she receives her cash legacy and then buy the asset from the purchaser. But such a course involves two transactions, double costs, and double delay. The process of appropriation short-cuts these stages, by allowing a transfer of the asset directly from the estate to the beneficiary, and can be regarded as a more effective mode of administering the estate.

The decision in *Kane*

Sir Richard Scott VC was concerned in *Kane* with an appropriation of shares in satisfaction of the statutory legacy under intestacy and insofar as it bore on the matter the relevant statutory provision was s 41 of the English Administration of Estates Act 1925.⁴¹ This statutory formulation contains no reference to the self-dealing rule and there is no express guidance in the section on whether the power can be exercised by a sole personal representative in favour of herself. The Vice-Chancellor used this fact in *Kane* to conclude that

³⁹ *Kane* (note 1 above), p 757.

⁴⁰ See the Non-Contentious Probate Rules, rr 19 and 20.

⁴¹ But the discussion can apply with equal relevance to s 68 of the Hong Kong ordinance; see note 15 above.

the answer to the question posed must accordingly be found in the pre-statute law which could be taken to apply unaltered by the statutory formulation. This was justified on the basis that the power to appropriate existed as a common law principle before the statutory formulation in 1925 and, since the legislation contains many detailed rules governing the exercise of the power of appropriation, but does not refer to the special case of the personal representative appropriating in her favour in satisfaction of a legacy, then it was necessary to look to the pre-1925 case-law for guidance on the matter. To this end the Vice-Chancellor embarked on an examination of various 19th century authorities which it was thought bore on the point. But if one looks at the section⁴² the power is expressed generally and permissibly: 'The personal representatives may appropriate any part of the movable or immovable property ...' Thus it could be argued with equal cogency that, since there is no restriction or prohibition in the section, the power can be exercised by a sole personal representative in favour of herself.⁴³

To the Vice-Chancellor a review of the earlier cases revealed that there was no case in which an appropriation by a sole personal representative in her own favour of assets (requiring valuation) in satisfaction of a pecuniary legacy had been upheld. Accordingly the Vice-Chancellor treated the matter as strictly undecided so far as appropriations in satisfaction of legacies were concerned.⁴⁴ There are other authorities which offer some support for the view that the self-dealing rule does not apply to all appropriations by a personal representative in her own favour: *Elliott v Kemp*,⁴⁵ *Barclay v Owen*,⁴⁶ and *Re Richardson, Morgan v Richardson*.⁴⁷ These cases, for the most part, involved an appropriation by a personal representative in satisfaction of a beneficial entitlement to the residuary estate — as opposed to in satisfaction of a pecuniary legacy. The Vice-Chancellor accepted that they provide some support for the view that a personal representative can appropriate assets of the estate in satisfaction of her entitlement to residue.⁴⁸ The decision in *Re Richardson* is perhaps the best known of these cases and is frequently cited for exactly the proposition stated,

⁴² Which as stated is in materially the same terms in both Hong Kong and England; see note 14 above.

⁴³ This argument could be said to have more force in relation to the Hong Kong ordinance which is expressed 'To Consolidate and Amend the law ...' whereas the English Act is expressed simply to consolidate.

⁴⁴ The Vice-Chancellor stated (note 1 above, p 759) that there was no case directly dealing with such an appropriation, but later cites *Re Bythway, Gough v Dames* (1911) 80 LJ Ch 246 as bearing on the point. Further (at p 763), he seems to accept that *Elliott v Kemp* (1840) 7 M & W 306 also provides some support for the point.

⁴⁵ (1840) 7 M & W 306.

⁴⁶ (1889) 60 LT 220, cited by Parry and Clark (note 5 above), p 475, as a authority that an administrator may appropriate to himself.

⁴⁷ [1896] 1 Ch 512, cited by Parry and Clarke (note 5 above), p 475 as authority that executors may appropriate to one of themselves.

⁴⁸ Note 1 above, p 763; at least to the whole residue. *Elliott v Kemp* (note 45 above) arguably goes further since the Vice-Chancellor accepted that the case provides support for an appropriation of furniture or other chattels in satisfaction of a pecuniary legacy or of a share in the estate.

providing authority that an executor can appropriate stock forming part of the assets of the estate in satisfaction of his own two-fifth's entitlement to residue. The stock rose in value and the appropriation was challenged by other beneficiaries who had not benefited from a similar appropriation. The validity of the appropriations was upheld. It is suggested that this is a clear and often cited authority implicitly negating the application of the self-dealing rule to appropriations. Although concerned with residue, the entitlement in question was only to a specified share of residue which involved choice and selection of the assets to be appropriated, thus providing some analogy with other forms of entitlement. Where the beneficiary is entitled to the whole residue this is an entitlement to property in its existing form and it will be transferred in specie. Thus, it is not really a case of appropriation at all, since the entitlement is to exactly that; it is not a satisfaction of one thing by another. It is on this basis that the cases on residue (at least where the entitlement was to the whole residue) can be distinguished from cases concerning pecuniary legacies, including the statutory legacy payable on intestacy.

The case cited in support of the Vice-Chancellor's conclusion, that the self-dealing rule did apply to appropriations in satisfaction of legacies, was *Re Bythway*.⁴⁹ But this somewhat obscure first instance case could, it is submitted, be regarded as simply decided on its own facts and as being a specific not a general authority. Joyce J identified the particular factors in the case as follows:

I am of the opinion, notwithstanding the cases that have been cited to me, that the executrix, as I believe she was well advised, could not appropriate to herself in part discharge of her legacies a security which had no market value and at her own price. It is the first time I have heard of such a thing being done.⁵⁰

It will be noticed that the judge in this passage seems to base his objection to the appropriation not so much on basic principle but on the practical factor of difficulty or unfairness of valuation — a factor which clearly lay at the foundation of the action in the case.⁵¹ If the invalidity is based on pragmatic considerations of value and not on principle, it rather begs the question whether the appropriation would have been held to be good if the uncertain valuation factors had not been present. Certainly the Vice-Chancellor accepted the validity of appropriations of property which was cash or the equivalent of cash and stated that the justification, and the only justification, for exempting

⁴⁹ Note 44 above. (See also the comment by Parry and Clark (note 5 above) on the case.)

⁵⁰ *Re Bythway* (note 44 above), p 249, cited in *Kane* (note 1 above), p 761.

⁵¹ The Vice-Chancellor accepted that, 'where the securities appropriated are securities which have no market value, so that it might be different if there were an appropriation of securities which did have a market value': note 1 above, p 761.

personal representatives from the self-dealing rule would be if the assets appropriated were equivalent, to all intents and purposes, to cash.⁵² This recognises the undoubted truism that the personal representative can always sell the assets and appropriate the cash, and could be taken to suggest that the application of the self-dealing rule should be limited to appropriations of property which have not been valued, or which are not capable of precise valuation.

Application to an appropriation of immovable property

The specific limits of the decision in *Kane* are clear. First, it was concerned only with an appropriation of movable property, shares in a private company, and does not specifically deal with an appropriation of immovable property, such as a flat. Second, the decision was expressly confined to an appropriation in satisfaction of a legacy (the spouse's statutory legacy on intestacy in the case) and distinguished an appropriation in satisfaction of an entitlement to residue. Third, the case was concerned with property which required valuation (shares in a private company), and the appropriation of assets which consist of cash or the equivalent of cash was contrasted.

But the question still remains: does the principle of invalidity stated in *Kane* apply equally to an appropriation of, say, a flat, under the general power in s 41/68?⁵³ This worry is compounded by another well-known problem arising from the case of *Re King's Will Trusts*,⁵⁴ a decision which itself came as a nasty surprise to most conveyancers and which still reverberates to cause title problems for probate lawyers and conveyancers. The surprise in that case was a ruling that a formal written assent in accordance with s 36 of the Administration of Estates Act 1925⁵⁵ is required to transfer title from a person holding in the capacity of personal representative to a person in the capacity of beneficiary, *even if that is the same person*. All lawyers now know that and do it properly, but unadvised lay personal representatives do not, and often simply assume the ownership of, say, a flat, and assume the transgression of the title from themselves as personal representatives to themselves as beneficiaries, without any formal document of assent to mark the transition. All is well for many years; the person assuming ownership is the person entitled beneficially to the flat and the other beneficiaries or relatives do not dispute that. But then the owner comes to sell the flat to a third party purchaser claiming to sell as 'beneficial owner' and the purchaser raises a requisition disputing the legal title. The

⁵² Ibid.

⁵³ As stated it is accepted that it applies to an appropriation of the matrimonial home under the Second Schedule.

⁵⁴ [1964] Ch 542.

⁵⁵ The decision is equally applicable to the corresponding s 66 of the Probate and Administration Ordinance.

requisition is good. The solution is either the execution of an inelegantly belated assent or an equally awkward change to sale in the capacity of personal representative. Such maneuvers work because 'once a personal representative, always a personal representative'; so the documentary machinery of the administration can be correctly completed years later if necessary. So it is a problem, but since it arises out of defective technical machinery it can be remedied by another document, and is soluble. But the problem exposed by *Kane* is far more serious because it arises out of contravention of fundamental principle and is thus much more difficult to remedy. Remember that the reason for the invalidity in the *Kane* scenario was not simply lack of formality but contravention of fundamental principle — namely the 'self-dealing rule.' As noted this rule invalidates, or at least renders voidable, transactions on the basis of fundamental defect, not simply mechanical defect. So consider what is the position if a sole personal representative appropriates (under the power in s 41/68, not the right in the Second Schedule) a flat to himself in satisfaction of a legacy. Even if the personal representative uses a formal written assent to transfer the property to him or herself, and thus avoids any *Re King* problem, the *Kane* problem can still exist and the transfer and thus the title may be held to be invalid as contravening the self-dealing principle.⁵⁶

A subsequent purchaser of the appropriated property from the appropriatee will have to rely on sub-s (8) of s 68⁵⁷ which contains provisions designed to protect purchasers of immovable property which has been appropriated 'in purported exercise of the powers conferred by this section.'⁵⁸ If the appropriatee disposes of the appropriated property to a purchaser then, 'in favour of a purchaser, the appropriation shall be deemed to have been made in accordance with the requirements of this section and after all requisite consents, if any, had been given.'⁵⁹ 'Purchaser' is defined for the purposes of the section as meaning 'a purchaser for money or money's worth.'⁶⁰ But what that definition leaves unsaid is whether the usual qualifications of 'good faith' or 'without notice' also

⁵⁶ It is, of course, well known that a personal representative cannot purchase 'either directly or indirectly' any of the property of the deceased, and any such sale is voidable: s 55. This recognises that the self-dealing rule applies to purchases of immovable property but it is silent and neutral on appropriations. It is interesting to note that s 68 expressly states that it is subject to s 54 (see note 16 above) but makes no reference to s 55, which could indicate that it is not so subject.

⁵⁷ Corresponding to sub-s (7) of s 41 of the English Act.

⁵⁸ The reference to 'purported' and later to 'shall be deemed' clearly indicates that the provision is concerned with irregular exercises of the power.

⁵⁹ It is interesting to speculate what is the scope of this provision. Does it cover only minor irregularities such as failing to obtain all necessary consents or would it cover fundamental defects such as a purported appropriation of property which is the subject of a specific devise or bequest (which is expressly prohibited by sub-s (2)(a))? In particular it can be questioned whether the subsection could cover a fundamental breach of principle such as an appropriation in contravention of the self-dealing rule.

⁶⁰ Sub-s (9), corresponding with sub-s (8) of the English Act. There is no general definition of 'purchaser' in the Probate and Administration Ordinance, which causes problems in other sections, such as ss 66(4) and 67(1) where the word is used without any definition at all.

apply.⁶¹ If these qualifications do apply a purchaser of immovable property making the usual investigation of title and examining the grant of representation and the assent would have notice that the vendor acquired the property as a sole personal representative appropriating in favour of herself and would not acquire a good title. It is submitted that this is the likely view of the matter since it cannot be the intention of sub-s (8) to provide a blanket protection to conniving or collusive purchasers. In any event the subsection only operates in favour of a purchaser so the appropriatee and any subsequent volunteers would not get a good title. The decision in *Kane* was not concerned with immovable property and there was no disposal to a purchaser and so provides no guidance on these matters.

Conclusion

The self-dealing rule is a general rule based on fundamental principle and if it applies to an appropriation of movable property then there is logically no reason why it should not equally apply to immovable property. In other words if a sole personal representative/beneficiary appropriates immovable property in a testate estate or of a flat which is not the matrimonial home in an intestate estate,⁶² the appropriation could be held to be invalid if challenged and the title of the beneficiary would be defective. If the appropriation is made by a spouse under the Second Schedule then para 5 would apply which expressly requires two personal representatives for such an appropriation; otherwise it would be invalid. But since this is subject to express provision it is perhaps less likely to be overlooked. The problem centres, it is suggested, on appropriations under s 41/68 by a lay personal representative where the application of the self-dealing rule may be overlooked. The moral for probate and conveyancing practitioners is to ensure that this does not happen and that two personal representatives are appointed to exercise the power and that the appropriation is effected by a properly executed formal assent. Remember Le Pichon J's salutary warning in *Tang Ying-ki*: 'the property may be virtually unmarketable thereafter ...'⁶³

Cause for concern indeed!

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⁶¹ The English Act in addition to the specific definition in s 41(7) also, somewhat confusingly, has a general definition of 'purchaser' for the purposes of the Act in s 55(1)(xxviii) as a person 'who in good faith acquires an interest in property for valuable consideration.' There is, as said, no corresponding definition in the Hong Kong ordinance.

⁶² And thus made under s 41/68 and not in exercise of the right in the Second Schedule.

⁶³ Note 10 above, p 264.

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