

Trusts: 3 certainties

Law



Sally is wishing to transfer her shares in Home Clean Ltd, and her gold Krugerrands. She is attempting to set up a third party trust, the named property to be held on trust by Tony for the benefit of the beneficiaries, Bertha and Colette. As it is the intention of Sally to create a trust by transferring the property to Tony to act as a trustee, then the trust is incomplete until the transfer is made. It is important to know whether or not the transfer has been made because if it has not then Tony does not hold the property on trust for the benefit of the beneficiaries and the property will instead be left to her husband in her will.

The starting point is that any person who is attempting to create a trust must fulfil certain requirements before their attempt can be given legal effect.

These requirements, known as the three certainties, were classified by Lord Lonsdale in the case of *Knight v Knight*. These are certainty of intention, (the intention to create a trust is clear), certainty of subject matter (the property intended to be the subject of the trust is identifiable), and certainty of object (the beneficiaries of the trust are clearly identified).

Secondly, it is important to consider the formalities for Sally (the settler) to transfer the legal estate in the trust property to Tony (the trustee). As the property is a voluntary settlement - in other words the beneficiaries are providing no consideration for the property- the rule in *Milroy v Lord* will apply. In *Milroy v Lord* (1862) Turner LJ stated: " to render a voluntary settlement effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary in order to transfer the property and render the settlement binding on him.

The formality requirements here raise problems for the application of the rule in *Milroy v Lord*. The main question that must be asked is when had the owner done everything necessary to transfer the property, should we look to the final act required of the owner or to the actual act of transfer? If we look at the shares in Home Clean Ltd as a starting point, and using the above statement from *Milroy v Lord* and the extension of the rule in *Re Rose* we have to see whether Sally had done everything within her power to transfer the trust property to Tony.

In *Re Rose*, the courts held that it is the final act required of the owner that is the decisive act in equity. This must now be applied to Sally's case. In early 2006 Sally writes a letter to Tony stating that he should find enclosed all her Home Clean Ltd share certificates. Shares must be transferred by entry on the company's books following the completion of a proper instrument of transfer. The formality with shares is that settlor must forward a share transfer form to the trustee.

This is not done but Sally purports to send Tony the share transfer form as soon as the company sends her one. We must now look at whether Sally had done everything within her power to send the transfer form to Tony. In April 2006 when Sally was killed in a road traffic accident, among the papers she was carrying was a completed share transfer form. This was dated the day before she died. From this information we can assume that Sally had not done everything within her power to ensure that Tony received this form as she could have posted it as soon as she had received it.

Thus, unfortunately the legal title in the shares had not been transferred to the trustee and therefore is not capable of being held on trust for the beneficiaries. That is because it is subject to the principle that equity will not perfect an imperfect gift. The shares will then fall into the will which will in turn be left to her husband. It is also Sally's intention to leave her gold Krugerrands kept in safety deposit box 123 at Floyds Bank in Old Market Square Nottingham on trust to Tony for the benefit of the beneficiaries.

As stated above, in order to transfer any property there must be certainty of intention, certainty of subject matter and certainty of object. In this instance the certainty of intention and object are clear; Sally wished to leave the gold Krugerrands to Tony for the benefit of Bertha and Colette. However, certainty of subject matter may not appear as clear. The case of *Re Goldcorp* established that if you are to make a trust for part of a bulk, that part must be separated from the bulk.

However, as Sally does not appear to be distinguishing between any particular gold that she is wishing to leave, we can assume that she means all the gold. For this no separation is required. Again, as above, this gift is a voluntary disposition, in that the beneficiaries need to provide no consideration for the property. It is then important to look at the requirement for transferring chattels. Mere delivery, provided that it is accompanied by the necessary intent to transfer on trust, is sufficient; alternatively, the property can be transferred by deed.

A deed will "avoid the need for actual physical delivery".¹ Automatically it would be understandable to assume that as Sally created a deed, that the

transfer is complete. However, when examining her words closely, " I promise" does not constitute a deed. She is not purporting to do something but promising to do so at some stage. This is not a deed. It therefore falls to look at whether there is intention and delivery. Sally's intention appears to be clear even though the formalities of the deed were wrong.

Delivery is also clear as in the letter written to Tony in early 2006 she encloses " the key and receipt for my safety deposit box 123. " Furthermore she has told the bank that Tony is to be given access to the safety deposit box. This appears to be enough to constitute sufficient delivery. The result of this is that a valid trust has been created. The legal title to the Krugerrands has passed to Tony to be held on a valid trust for the beneficiaries. Thus the gold Krugerrands will be excluded from the will and Sally's husband will not be entitled to them.