

Can equity perfect an imperfect gift essay



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When is a gift completed? 1 This very simple question has caused a great deal of debate between academics after decisions of recent case law in this area. The dictionary definition of a gift is '... the complete transfer of property to another.' 2 Here both legal and equitable title pass and the donee becomes the absolute owner of the property. To perfect a gift, it is necessary that the relevant form of transfer relating to the type of property involved is employed. If not, there is an imperfect gift, and equity will not perfect an imperfect gift.

This can be differentiated from a trust, which is dependent upon identifiable property being transferred from its legal owner to one or more trustees to hold and manage property for benefit of ascertainable beneficiaries. 4 For a trust to be constituted, the legal title to trust property must be transferred to trustees for a valid trust to be constituted. The modern case law in particular with regards to shares in a private limited company mainly consists of scenarios where intended gifts or shares are thwarted due to the donor's non-compliance with some requirement of transfer either at law or equity.

This essay will critically analyse how methods of constituting a trust or gift have evolved through case law, to a stage now where there seems to be a relaxation of the orthodox principles applying to imperfect gifts. 6 Indeed some academics have gone much further and have used quite damning language in describing what is seen by many to be a destruction of established principles. *Milroy v Lord*⁷ established the age old maxim that 'equity will not perfect an imperfect gift'.

In this case it was recognised that there must be a clear separation of legal and equitable interests, and that the trust must be constituted and the legal title vested in the trustee, which can be achieved in two ways as stated by Turner LJ. He may declare himself as a trustee of the property, holding it for the beneficiaries or he may transfer the property to a third party who will hold it on trust for the intended beneficiaries. 9 Once the declaration or transfer has taken place, the trustees then hold the legal title to the property contained with the trust for the beneficiary.

They are said to have an interest in the trust property that can be enforced through equity if necessary. Historically the law seemed to very clearly defined and simple to understand. A trust would only become fully constituted and valid where the settlor complied with the above rules. An intending settlor who fell between these two stools achieved nothing as his 'trust' was incompletely constituted. 10 It must be noted that an unsuccessful attempt to achieve a voluntary settlement by one of the methods will not be construed as a successful attempt via the other methods. 1 Hopkins regards this area of law as "trite law" stating that an express trust is constituted in either of the two ways mentioned above. 12 This approach was adopted in the case of *Re Fry*¹³, here the shares that were being transferred could only be done if they were registered by the Treasury.

Although all the requisite transfer forms were filled in by the donor, consent from the Treasury to register the shares was not obtained before the donor died; therefore there was no transfer of legal title to the shares. 5 The court's decision was based on the fact more was required from the testator to effectively transfer the legal title to the shares i. e. the settlor must have

done everything which... was necessary to be done in order to transfer... 16
Some may argue that it appears somewhat harsh that a donor has done all in their power to enact a transfer and may be let down by the incompetency of a third party. What would be the situation if the delivery of the donor's wish to the Treasury was delayed because of a postal strike?

Romer J appeared to agree with this analysis and recognised that the law as it stood had potentially unfair consequences, saying that he had arrived at his decision 'with regret' and went on to state he had 'no alternative'. 17
Therefore it can be seen that even at this early stage, the courts were trying their best to find a way around the rigidity of this area in law and were seeking to tailor, albeit with limited success, it to avoid inequitable results. In *Re Rose*¹⁸ the law surrounding imperfect gifts evolved and altered the traditional position laid down in *Milroy*.

The settlor intended to transfer shares, but the directors of the company had an effective veto over any transfer. Rose executed transfers in shares in the required form in March 1943, but the company did not register them until June 1943, 20 taking into account potential tax implications. The Court of Appeal held that the date of constitution of the trust was when the settlor had done all he could (March 1943), rather than when the directors consented to, and registered, the transfer.

This became known as the 'last act' doctrine meaning there may be an effective transfer at the point where the transferor had done everything within his power to transfer the shares. It was easy to relate such an approach to equity's flexible nature and to equity's interest in substance

rather than form. 21 Halliwell is in agreement that the case of *Re Rose*²² is a valid exception to the rules laid down in *Milroy*. 23 She agrees that where the donor has done all that is necessary to transfer their title to the donee, the trust is valid.

Hunter, however states that the decision in *Re Rose*²⁵ is 'questionable' and that the decision should be 'overruled', he quotes Todd who suggests that the transfer in *Re Rose* was not a foregone conclusion, in that the donor had not done everything in his power to effect the share transfer-because the directors of the company had possessed a power to refuse to register the name of the transferee, which they could have done. 26 It would seem that the decision in *Re Rose* is inconsistent with that of *Re Fry*²⁷ where if the above analysis was used the cases would be analogous.

An important point that must be noted is that on the facts of *Re Rose*, there was no evidence to suggest that Rose intended to make himself a trustee of the shares. In *Richard v Delbridge*²⁸ it was stated that there must be express intention, which was clearly lacking here. Sir George Jessel M. R. said in *Richards v Delbridge* that '... for a man to make himself a trustee there must be an expression of intention to become a trustee... '29 There was certainly no clear intention in *Re Rose*. It appears that at best, the area must be described as 'muddled'!

Ho Tham however states with regards to Jenkin LJ judgement in *Re Rose* that the decision gave a 'relatively clear understanding' to this area of law. 30 Todd and Lowrie welcome the development of 'increased flexibility'³¹ which has occurred due to the decision in *Re Rose*. Garton appreciates the dilemma

above but states that the rule in *Re Rose* should only operate to allow a transfer to take effect in equity before registration where 'registration is a rubberstamping exercise' in public limited companies. ³² He goes on to say that that only in 'exceptional circumstances' directors may refuse to register a change in shareholder.

He elaborates on this by stating that the rule in *Re Rose* should be limited in the case of share transfer to 'those few companies where the directors have no discretion to refuse registration whatsoever'. Garton seems to be trying to distinguish *Re Rose* from *Re Fry* to justify the reasoning of the decision.

However this is not how the law stands at the moment and it remains active in its original form as demonstrated in *Mascall v Mascall*³³. Even Garton's best attempts still led him to describe the issue as a 'significant problem' and argued that limits should be on place and this ability should only apply to '... hose few companies where the directors have no discretion to refuse registration whatsoever.' ³⁴ It will come as a surprise to few that given the condemnation of the law by the Courts, the opportunity for modernisation was too good to refuse. The case of *Pennington v Waine*³⁵ appears to have developed a new maxim: "Although equity will not aid a volunteer, it will not strive officiously to defeat a gift". ³⁶ This will be discussed in greater detail later, but the decision has attracted both support and criticism in equal measure.

Halliwell has described the current position as allowing the courts 'unfettered discretion' following a 'dramatic change of heart', ³⁷ a view which seems to be supported by Morris who describes the decision as 'an alteration in the underlying principles' where practitioners 'may find it

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unrecognisable'. 38 This however, has been rebuffed by Garton who has reacted positively, labelling the decision a 'step forward to resolving the disparity between the existing operation of the rule and the orthodox trust law theory', arguing that it also allows the courts '... take the surrounding circumstances... into account'.

This view is supported by Lowrie and Todd⁴⁰ who when commenting on the decision in *Re Fry*, stated that the test should be similar to that in *Richard v Delbridge* where intention is found where the settlor deals with his property so 'as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person.' However, although it must be said that in order for our legal system to be at its brilliant best, a creative element should never be discounted, an even more important basis of the law is its certainty, and it can be argued that *Pennington* eats away at this certainty.

The next major case in this area was *T Choithram International SA v Pagarani*.⁴² This case promoted the idea of good conscience and this new doctrine of unconscionability. In other words the court would hold a trust as constituted where it would be unfair not to. The Privy Council in this case held that the settlor had constituted the trust, and that the language and articulation of 'gift' by the donor in the context of the charitable foundation could only be interpreted as intending to create a trust.⁴³ It would have been unconscionable for Mr Pagarani to recall the gift of the shares to the foundation.

In coming to a decision Lord Browne-Wilkinson identified a number of key facts which could only lead to the conclusion above. Firstly the foundation has no legal existence apart from the trust declared by the foundation trust deed, 44 so any such property belonging to the foundation can only be held for it by the trustees of the foundation. Secondly, Lord Browne-Wilkinson explained there is no difference between the situation where a settlor declares himself sole trustee and where he declares himself trustee being one of a number of trustees. 5 It did not matter that there was no formal transfer of the shares as long as they were vested in one of the trustees. He stated “ although equity will not assist a volunteer, it will not strive officiously to defeat a gift”. 46 A point to note here would be that this is a surprising conclusion as the case of *Bridge v Bridge*⁴⁷ established that a trust was not constituted where the trust property was transferred to on trustee, the donor, out of many. There is insufficient evidence that TCP intended himself to be a trustee.

Halliwell is clearly not happy with decision in *Choithram*⁴⁸ stating that the decision was ‘ wrong’ and that we are left ‘ in the realm of unfettered judicial discretion’. 49 Rickett also criticises on a number of basis, first he states the case is really not novel. This is due to the fact a different conclusion is reached ‘ on effective constitution of the trust because their Lordships construe the case as one of a successful declaration by TCP of himself as trustee, rather than as one of transfer to trustee’. 0 He further states that there is something of a parallel here between ‘ the doctrinal consequences of the lenient interpretation offered in this decision and of the lenient reasoning on transfer of property rights in equity employed by *Re Rose*’.

Garton takes the view that the case should be viewed as a declaration of express trust, where there must be 'certainty of intention on part of the settlor'. He also suggests that s. 61 of the Trustee Act⁵² should be used 'to relieve the transferor of any liabilities which arise by incidence of his trusteeship'.³ This is to avoid problems such as the transferor being liable of trusteeship if the transfer of shares is given effect via express trust. Hopkins states that the decision is correct on its facts and should be welcomed. He believes that the maxim should be adjusted to "equity will not assist a volunteer if, in doing so, it would repair the consequences of a would-be donor's folly".⁵⁴ All these academics seem to correct in their own context, and careful attention must be given to all their views before disregarding them.

Finally the case of *Pennington v Waine*,⁵⁵ this called into question the maxim that equity will not perfect an imperfect gift and altered the common law set out in *Re Rose*.⁵⁶ Here Mrs Crampton wished to transfer 400 shares to her nephew and also make him the director of the company. She consulted with a partner of the relevant company's auditors and signed a transfer form. The form was kept on the company's file and was never delivered to the company or her nephew. The partner told the nephew that nothing further was required from him.

Subsequently Mrs Crampton executed a will, which did not include the 400 shares. The Court of Appeal held that it would have been unconscionable for Mrs Crampton to have recalled what was clearly intended as a gift.⁵⁷ This decision has caused a widespread of academic debate. Halliwell believes that the decision has left the law in 'disarray'; she believes that Lord

Browne-Wilkinson dictum in Choithram was taken and applied out of context.

58 She also states that the decision represents 'unfettered judicial discretion' and that this notion of unconscionability must be based on principled reasoning.

Also she observes that the decision is 'completely irreconcilable with previous authorities'. 60 Doggett questions the justification of employing such a concept at all; she states that the factors that justified the finding of unconscionability did not cause any detriment to the donee. 61 Hunter is of the opinion Mrs Crampton had not done everything in her power to affect the transfer, therefore its 'theoretical foundations are hardly strong'⁶² and that the decision should have been the same as in *Re Fry*.

In support of this he states why did Arden LJ not follow Professor Worthington's view? 63 After referring to it in his judgement. Morris is of the view that the decision adds a further limb to the original test laid down in *Milroy*. 64 She believes now the question should be is the donor's conscience affected? If not, does the gift meet either of the old *Milroy* tests? She states that under this test external events would make it unconscionable for the donor to rescind the gift. 5 They are all trying to state that the broad application of a test of unconscionability is far too dangerous a discretion to give to the courts and one which introduces much uncertainty into the area of law which strives to achieve certainty. 66 Garton takes the view that this notion of unconscionability has 'the potential to develop into a flexible way of mitigating the harshness of the legal formalities'. He is in essence stating that decision was a fair one and that under normal circumstances the gift would have failed and that would have been unfair.

He also suggests that Pennington should not be seen as introducing a new exception '... but rather it is an opportunity to recast Re Rose in a theoretically sound fashion by shifting the focus away from formalities and onto the conscience of the transferor. '67 This view is not shared by Delany and Ryan⁶⁸ who finds it difficult to accept that this use of unconscionability is indeed 'theoretically sound'. Ho Tham takes a different view when reviewing the decision of Pennington. He believes equity alone would be inadequate and contract law would help bridge the gap nicely.

Harold's equitable interest in the shares only arose upon his acceptance of the unilateral offer made by Pennington on Mrs Crampton's behalf. ⁶⁹ Therefore it can be viewed that Pennington's communications to Harold may be viewed as a unilateral offer to complete the transfer of shares. He is also in support of Garton's view in that giving a share might not be as difficult as it once was and this cannot be a bad thing. In conclusion we can see the decision in Pennington⁷⁰ has left this area open to extensive debate.

It is now clear that Turner's statement that the settlor must do 'everything' required must surely be classed as redundant. ⁷¹ A widespread of literature has been analysed in this essay and I believe that Halliwell's views are more preferred. She believes that the decisions in Choithram⁷² and Pennington⁷³ are worrying and may prove problematic. Ricketts has asked the question himself of 'when is a gift completed?' ⁷⁴ In some cases it is impossible to say exactly when the settlor intended the transfer to become effective.

It is also worth asking what relevance legal rules have at all in trust constitution. The role of judicial discretion has also been questioned: '... the

decisions of the Privy Council in *Choithram* and the Court of Appeal in *Pennington* illustrate just how generous the courts can be when there is a judicial desire that the transfer should succeed. '75 It is difficult to assess whether *Pennington* is here to stay. Morris believes it will ' come to be regarded as an alteration in the underlying principle. '76 It certainly seems likely that the courts will continue to take account of unconscionability.

Although the courts may, in the eyes of many, have come to a fair decision, the question must be asked whether there is a role in the law for unconscionability. The problem here is that the law must evolve through established principles. This was considered in *Milroy*⁷⁷ when Knight LJ stated: '... I find myself, almost or altogether with regret, unable to agree with the decree as to the banks shares... '78 Instead of following legal principles, an established rule has been destroyed over a short period of time due to the courts lack of consistency.