

Formalities & Constitution of Trust Property

General principles: formalities

- Lifetime (*inter vivos*) trusts of land are unenforceable unless they comply with s 25(2) of the Property Law Act 2007 (writing, signed)
- Lifetime (*inter vivos*) trusts may generally be created orally
- Will / testamentary trusts must be in a valid will (Wills Act 2007)

General principles: constitution

- A trust is only properly set up or 'constituted' when the *trustee has the property* to which the trust obligations relate
- The **transfer of legal title** to the property, or a **self-declaration** of trust [i.e. already own property], are the obvious and usual way of doing this
- However, beyond those options there is another doctrine in equity that allows a trust to be constituted...
- ... relating to the general circumstances in which **equity** will enforce **gifts** that are incomplete at law (legal title has not properly been transferred)
- i.e. title passed in equity before title passed in law.

General principles: *Milroy v Lord*

- Q: How does a person (A) provide for another (B) according to the *Milroy v Lord* analysis?
- A could:
 - make a *gift* to B
 - *transfer* the property to T to hold for the benefit of B
 - make a *declaration of trust* in favour of B
- Cf 'certainty of intention': what transaction / arrangement was intended?
- Different rules in order to pass title for different types of property.
- Court only gives effect to the kind of thing intended.
- Issue arises if gift is incomplete or have not actually transferred to trustee

Milroy v Lord:

- Settlor intended to establish trust for niece over shares – his attorney was a trustee.
- Settlor wrote a document setting out what he wanted done with the shares, but shares were not transferred to the trustee during his lifetime. Transfer from settlor to trustee to constitute trust did not happen, hence no trust.
- After settlor died, those who would receive property under intestacy rules challenged the trust.
- Niece: give effect to intentions of the settlor as it was a self-declared trust, hence transfer of property to trustee not necessary
- Court rejected argument, gives effect to transaction as intended. If intended trust was one where someone else was the trustee and there was a failure to constitute the trust by transferring property to the trustee, the Court will not give effect to a fiction to benefit people who should benefit. The Court gives effect to property relations which the parties intended.
- The settlor must have done everything to transfer the property to the trustee to create valid a trust. If self-declare a trust, trust valid as own property to start with.

- Equity court does not perfect an imperfect gift.

Milroy v Lord

“in order to render the settlement binding, one or other of these modes must... be resorted to, for there is no equity... to perfect an imperfect gift. ... [I]f the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust.”

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| <p>Re Rose</p> <ul style="list-style-type: none"> • Not a case of making the gift effective when not effective • Husband held shares and wants to avoid inheritance tax. • Final position is the wife owns the shares. She wanted gift legally transferred earlier than when it was actually completed • Shares required documents to be filled out by both the owner and is accepted by the company. | <p>Initial position</p> <p>Husband
(Legally and beneficially entitled to the shares)</p> <p>Wife
(nothing)</p> | <p>Before Tax Date (March 30 1943)</p> <p>Husband
(Legal title)</p> <p style="text-align: center;">↓ trust</p> <p>Wife
(Beneficial entitlement)</p> | <p>Final position (June 30 1943)</p> <p>Husband
(Nothing)</p> <p>Wife
(Legally and beneficially entitled to the shares)</p> |
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- Wife argued after husband’s death that she does not need to pay inheritance tax as legal transfer occurred before husband died.
 - Time limitation whereby have to give property a certain time before death, otherwise subject to an inheritance tax.
 - Legal transfer did not occur within 5 year period before husband’s death, hence inheritance tax payable on gifts, unless transferred occurred prior to that.
 - Wife: a trust arose when husband signed the form to transfer the shares and sent it to the company to process and register.
 - Falls foul of Milroy v Lord – whether the courts can give effect to a trust because it occurs earlier in time in order to avoid the inheritance tax.
 - If a person purporting to transfer property executes documents which are not apt to effect that purpose, the Court cannot then extract from those documents some quite different transaction. Court will not give effect to a transaction which was different from the one actually intended.
 - Affirmed Milroy as correct principle whereby courts enforce transactions people intended, not other transactions merely because something has gone wrong with the intended transaction.
 - There was a trust in advance of the transfer of legal title which avoids the inheritance tax.
 - In Milroy, Turner LJ: the settlor must have done everything necessary to transfer the property to the trustee in order to constitute the trust

- **“Re Rose” exception:**

- “...the settlor did everything, which according to the nature of the property comprised in the settlement, was necessary to be done by him in order to transfer the property...”
 - Lord Evershed MR: *Rose v IRC* (1952)
- Q: What was the problem facing the widow in *Rose*?
- Court can give effect to equity even before transferred legal title to trustee or made a gift to someone. Court recognises a gift or trust is constituted provided the donor or settlor has done everything they need to do in order to transfer the property.
- Do not have to do everything necessary to transfer legal title (i.e. legal title does not have to actually pass) if someone else has to take action on the basis of what the settlor has already done.
- If a dividend was declared after the time, even though settlor was still the legal owner, the dividend will be held on trust for the trustee.
- Court: CIR no inheritance tax on Mr Rose as he has done everything he could to carry out the transfer i.e. filling in the form and delivering to the company.
- Doubts whether husband can take the benefit of the property for himself despite holding legal title once he has taken every step needed to make the transfer as beneficial entitlement has transferred in equity to wife.
- There was a trust – not an express or self-declaration of a trust. Court gave effect to the transaction intended.
- Crucial that husband was no longer beneficial owner which controls whether inheritance tax deadline was met.
- Court not doing what it thinks is just, but giving effect to the transaction before them and respecting *Milroy v Lord* where if a person transfers property in one way, the court will not give effect to it in a different way.
- Equity will not perfect an imperfect gift

Q: When will Equity ‘perfect an imperfect gift’?

- *Curtis v Pullbrook* interpreting *Pennington v Waine* and prior cases:
 1. Donor has done everything necessary to enable the recipient to enforce the gift w/o further action from donor
 2. Detrimental reliance by recipient [estoppel]
 3. Benevolent construction of the documents [trust]
- Benevolent construction – interpret the transaction in a way which makes it effective as a trust despite *Milroy*: cannot disregard the intended transaction.
- Court giving effect to a trust or gift in a way which is counter to what the parties seem to be intending to do.

Choithram v Pagarani

- Mr Pagarani [TCP], a wealthy businessman, wished to set up a foundation in Jersey. The foundation [trust] property was accounts and shares of BVI companies.
- At an elaborate ceremony, a trust deed was signed
- Then TCP stated something like “I give my property to the trust”
- TCP told the company accountant to transfer the accounts and shares to the trust; the accountant altered the books of one company, but the shares were not legally transferred before C’s death
- Some of Mr Pagarani’s family challenged the validity of the trust
- Pagarani wanted to give his wealth for charitable purposes on trust. His wealth was in companies owning supermarkets and accounts owed from his work with companies.
- TCP had 6 daughters and wife, and another wife and 8 children. Sons involved in the trust and want it to succeed.
- Indian family challenged validity of the trust, if successful then trust is invalid which means property goes back to TCP on resulting trust, distributed according to intestacy rules. Wins in lower courts as no constitution of trust property and settlor died so trust will never exist.
- Issues: no certainty of subject and trust was not properly constituted
- Settlor: TCP, trustees: TCP, sons and accountants
- TCP owns the company but never signs the documents and never actually transfers the shares to the trustees to constitute the trust. He does not do everything he needs to do in order to transfer the rights.
- TCP owns the property as a trustee although he didn’t transfer the property to the trustees, he constituted a trust as he held the property as the owner.
- Following Milroy, if the trust was to be established by transferring property to the trustees but that did not occur, then cannot claim that there was a self-declaration of a trust. Courts will not give effect to a different type of transaction.
- Following Re Rose, TCP did not sign the documents to transfer title to the shares and do everything he needed to do to transfer the property – cannot claim there was a self-declaration of a trust.

Issues

- How can we characterise the transaction as one that satisfies the requirement that the trustees own the property, given that only TCP owned the property before he died?
- ‘benevolent interpretation’ of the intended transaction
 - “I now hold my assets in the companies on trust for the charitable purposes of the foundation”
- The trust is constituted as soon as one trustee holds that property subject to the equitable obligations of trusteeship
- PC: Constituted trust property as TCP is owner of the property, self-declares so has a valid trust.
- Intention to create an irrevocable gift – settlor could not renege as it was not his intention to create a revocable gift and because he self-declared a trust.

- Benevolent interpretation - Court gives effect to the intentions of people who make legal transactions by looking at what they say or do.
 - Special ceremony creating foundation
 - Signed a trust deed in 1991 where TCP made a declaration gifting his shares and wealth to the foundation
 - Told the accountant: “All my wealth, shareholdings, credit balances in the accounts should be transferred to international foundation”.
- Lower court: settlor was making a gift and attempted to establish a trust but he did not transfer the shares and accounts to the trustees to hold for the benefit of the charitable foundation. Settlor said he was going to make the transfer, but those words alone are not effective in making a transfer of the property. Transfer not effected during his lifetime when he died and he still owned the property which was supposed to be set on trust. Consequently, the trust was not constituted.
- Language where he was going to gift the property to the foundation where re Rose or the property rights would be transferred to the trustees, which does not sound like a self-declaration of trust.
- PC: Benevolent interpretation that it was a self-declaration.
 - TCP at the ceremony thought that his words were effective in establishing a trust.
 - He had been advised that he had done enough to establish a trust and he was not violating Milroy.
 - He did not sign documents as he did not think he needed to sign documents to transfer the shares to the trustees.
- PC: from the beginning TCP intended to establish a trust by self-declaration.
- New situation. Although words used by TCP are normally appropriate for an outright gift i.e. “I give to X”, there is no inconsistency with Milroy if TCP’s words are giving their only possible meaning in the context.
- The foundation has a legal existence outside of the trust. “I give to the foundation” means “I give to the trustees of the foundation trust deed to be held by them on the trusts of Foundation”. Essentially words of trust.
- Issue where there would be 8 trustees but only one held onto trust property – whether there has been a constitution of trust property where nominated trustees do not have property rights except one.
- PC: trust property is vested in one of the bodies of the trustees.
- TCP self-declared the property he held to as being on charitable trust and he is bound to give effect to the self-declaration of the trust, which means he has to ultimately transfer the property to the other trustees so they can properly be held as trust property. TCP would not later claim that there was no valid trust.
- Trust has been constituted by a self-declaration of the trust when he signed the foundational trust deed and said those words of gift. All that remained was making the actual transfer that his estate was bound to transfer in equity.
- Different way of constituting a trust, need to find enough evidence that it was intended.
- Trust constituted by a self-declaration notwithstanding all the other trustees have to be given the property. Trust obligation arises as soon as he self-declared the trust.
- Is it a benevolent interpretation or giving effect to what was intended all along