The role of the trust mechanism in the rule in Re Rose

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Cases cited
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Rose, Re [1952] Ch. 499
Milroy v Lord (1862) 4 De G.F. & J. 264
Fry, Re [1946] Ch. 312

Legislation cited
Trustee Act 1925 (c.19) s.61

*Conv. 364 Introduction

In *Pennington v Waine,* [1] the Court of Appeal reconsidered the extent of what has been termed "the rule in *Re Rose*", [2] which mitigates the general rule that a gift which fails at common law for want of formalities will not take effect in equity. In the light of this and earlier cases, this article examines the practical and theoretical problems inherent in the rule, with particular focus on the role played by the trust mechanism. It is put forward that the introduction of unconscionability as a justification

for perfecting imperfect gifts, although not without its problems, is a step towards resolving the disparity between the existing operation of the rule and orthodox trust law theory.

At Common Law

To appreciate the full significance of the rule in *Re Rose* it is necessary to be clear as to the formalities required to transfer title at law. The case law relating to the rule to date has almost invariably involved *inter vivos* attempts to transfer certificated shares. [3] In such cases three requirements must be met before legal title will pass. First, the transferor must execute the appropriate transfer form. The form that is appropriate will usually be determined by the company's articles of association and can generally take any form so long as it is in writing. [4] Secondly, the ***Conv. 365*** transferor must deliver up the executed form along with the share certificate. If all the shares on the certificate are being transferred to one transferee then this is who the certificate and transfer form will be delivered to. If, on the other hand, the shares are being transferred to several people, or the transferor wishes to retain title to some of the shares, they are delivered straight to the company. Finally, the directors of the company [5] must approve the registration of the transferee as new owner of the shares on the register of members which the company is obliged to keep. [6] In the case of private limited companies, the articles of association will usually grant the directors discretion to refuse to register any transfer of shares where registration is not, in their opinion, in the bona fide interests of the company. [7] There is no reason why a similar discretion cannot be granted to the directors of public limited companies; however, in the case of those which are listed on the London Stock Exchange, the directors will normally have no discretion to refuse registration. [8]

In Equity

The starting point for the position in equity is, of course, the decision in *Milroy v Lord,* [9] where the settlor purported to assign 50 shares in the Louisiana Bank to the defendant as trustee for the plaintiff. The settlor delivered up the executed transfer form and share certificates but the defendant's name was never entered on the bank's register of members and so legal title had not been transferred to the defendant. The Court of Appeal held that equity would not allow the intended transfer to take effect as a declaration of trust in favour of the plaintiff, lest all imperfect gifts operate as perfect trusts and remove the need to comply with the formalities for transfer at law. [10] *Milroy v Lord* was approved some years later by *Re Fry,* [11] where the transferor delivered up the executed transfer form and share certificates but failed to comply with an additional requirement, imposed by virtue of his domicile abroad, to obtain Treasury consent to the transfer. [12] Title did not pass either at law or in equity.

Conv. 366 Both the Court of Appeal in *Milroy v Lord* [13] and Romer J. in *Re Fry* [14] expressed regret at the conclusions at which they felt compelled to arrive, and the position is now mitigated by what has come to be known as the rule in *Re Rose.* In *Re Rose* all the formalities required to transfer legal title of two blocks of shares were complied with; the issue was whether the beneficial interest in the shares passed before the legal transfer was complete, as this affected the assessment of estate duty following the death of the transferor. The Court of Appeal held that the transfer was effective in equity before the directors of the company registered the transferee as the new owner. [15] In doing so, the Court distinguished *Milroy v Lord* and *Re Fry,* on the ground that in the earlier cases there remained something still to be done by the transferors themselves. [16] Instead, the Court preferred the analysis of Jenkins J. in the earlier (and unconnected) *Midland Bank Executor and Trustee Co v Rose,* [17] where shares mentioned in the testator's will were found to have already been transferred *inter vivos* despite the lack of registration as the testator had done "everything in his power" to effect the transfer and on the strength of this equity was prepared to perfect the gift. [18]

The Impact of Pennington v Waine

In *Pennington v Waine,* Ada Crampton was the majority shareholder and a director of Crampton Bros (Coopers) Ltd. On September 30, 1998, she met with one of the company's auditors, Mr Pennington, and expressed her intention to transfer 400 of her shares to her nephew, Harold Crampton. In furtherance of this, Ada executed an appropriate share transfer form which she delivered to Mr Pennington. She then informed Harold of her intention to transfer the shares into his name, and also that she wanted him to be appointed director. These two wishes were not unconnected as the articles provided that directors must hold at least one share in the company; at this time, although Harold was company secretary, he held no shares. On October 15, Mr Pennington told Harold that he had been made director and Harold duly signed Form 288A giving his consent to this. Mr Pennington also told Harold that Ada had instructed him to give ***Conv. 367*** effect to the transfer of the shares and that

Harold need not concern himself with this. In actual fact, nothing further was done by Mr Pennington to complete the formalities required to transfer the shares--he merely passed the executed share transfer form to a colleague, who promptly filed it.

The main issues before the Court of Appeal were (i) whether equitable title to the shares passed to Harold before Ada's death; and, if so, (ii) at which point in the chronology this occurred. Their Lordships agreed, for different reasons, that equitable title had passed to Harold and dismissed the appeal. Arden, Schiemann and Clarke L.JJ. all held that equitable title would pass in the situation where the transferor has not done everything needed of them to secure the transfer if it became unconscionable for the transferor to change his mind about the transfer. [19] Arden and Schiemann L.JJ. found that this had happened by the time Harold consented to be director. [20] Clarke L.J. held that equitable title had in fact already passed to Harold, by virtue of the executed share transfer form coupled with the absence of any intention on Ada's part that the transfer not take immediate effect. [21] Arden and Schiemann L.JJ. also provided an alternative *ratio,* namely that by their actions Ada and Mr Pennington impliedly agreed to act as Harold's agents for the purpose of completing the formalities, which Harold relied upon to his detriment by agreeing to be director. [22] Whatever the *ratio,* it is clear that as Ada had not done everything required of her personally by law, *Pennington* shifts the boundaries of the *Re Rose* exception to the rule that equity will not perfect an imperfect gift.

When Does Equity Step In?

It is not entirely clear from the judgment in *Re Rose* at which precise point the equitable title passed; the Court of Appeal simply holding that this had certainly happened by the time the executed transfer form and share certificates were delivered. [23] However, emphasis was placed on the delivery of the shares ***Conv. 368*** throughout the judgment, and received wisdom is that delivery was essential for equitable assignment. [24] In the context of conveyancing, *Re Rose* has been developed by *Mascall v Mascall* [25] and *Corin v Patton* [26] such that it is now accepted that the transferor need not do "everything in his power" even though another party may be entitled to do one of the necessary acts; the transfer will be effective in equity at that point when he has done all that which is required of him personally to complete the formalities at law. Despite this, Clarke L.J. in *Pennington v Waine* suggests that in the context of share transfers there is no requirement that the share certificate and transfer form be delivered for title to pass in equity--even though only Ada or her agent could do this. Instead, all that is required is the execution of the transfer form in circumstances such that the transferor intends the transfer to be effective immediately. [27]

This approach is potentially problematic. First, it will depend on the transferor making his thoughts on this matter known, otherwise it will be virtually impossible to determine whether he intended the transfer to be effective "immediately" as opposed to "as soon as the law allows". Secondly, without the presence of any additional factor to justify the transfer in equity (*e.g.* unconscionability) [28] it greatly diminishes the protection which the legal formalities afford the transferor. [29] By requiring the completion of the larger part of the formalities, the rule as it stood previously struck a more even balance between on the one hand ensuring the transferor was aware of the significance of his actions and, on the other, preventing the gift from being officiously defeated.

Entry of the Register of Members

Even if we accept that Clarke L.J. was mistaken with regard to this issue, [30] and assume that the point at which a transaction is effective in equity is when the transferor has done all required of him personally, there would appear to be a significant problem which crops up in those cases which involve share transfers. This stems from the fact that the reason given in *Re Rose* for ***Conv. 369*** distinguishing *Re Fry* fails to withstand close scrutiny. *Re Fry* turned on the fact that, although there might have been nothing further for the transferor to do personally as the Treasury could simply have granted consent and thus completed the formalities, there was the possibility that further information may have been sought from the transferor to inform the decision whether to grant consent. The same, though, is true of the decision of the company directors to register the name of a new shareholder on the register of members: as noted above, the directors will usually have discretion under the articles of association to refuse registration, and it is entirely feasible they might ask the transferor to supply further details about the transfer and the transferee. On this basis it could be suggested that in the context of share transfers the rule in *Re Rose* should only operate to allow a transfer to take effect in equity before registration in the case of those public limited companies where registration is a rubberstamping exercise; however, even here it is still possible that additional information will be sought from the transferor. Even in the case of companies listed on the Stock Exchange, which normally allow no discretion to refuse registration, the Listing Rules provide that in "exceptional circumstances" directors may refuse to register a change in shareholder if they obtain the approval of the Exchange. [31] It would appear that so long as the rule is based on the transferor doing all that is necessary of

him, its application in the share transfer context should be limited to those few companies where the directors have no discretion to refuse registration whatsoever. This would, of course, drastically reduce the impact of the rule.

Subsequent Transfer of Legal Title

A further problem is the issue of whether it is necessary for legal title to pass eventually in order for equitable title to pass at an earlier point,[32] as happened in *Re Rose* itself. If so, the effect of the rule would simply be to render a valid legal transfer effective in advance in the eyes of equity. There will clearly be situations where it is immensely useful that beneficial title passes early --for example, where it facilitates the avoidance of death duty as in *Re Rose*; where it means the transfer occurs outside the relevant time period for the purposes of insolvency provisions, whereby a transaction made by a transferor at an undervalue can ***Conv. 370*** be set aside if he is subsequently declared bankrupt[33]; or where dividends are paid out before the new owner is registered.[34] Even so, it would dramatically reduce the impact of the rule if it could not operate to transfer title which would not otherwise pass; and on the strength of existing authority such as *Mascall v Mascall, Corin v Patton* and *Pennington v Waine,* where legal title had yet to pass by the time the case came before the courts, the passing of legal title appears to be irrelevant to the operation of the rule in *Re Rose.*

If legal title need not pass in order for equitable title to pass, we are faced with a problem in relation to share transfers. If the company directors are granted a discretion under the articles of association to refuse to register new members, and they have a legitimate reason to refuse registration in a particular circumstance, this could be circumvented if the rule in *Re Rose* applies. One of the effects of equitable title passing is that the transferor becomes trustee for the transferee, and as such will be compelled to act in his interests in all matters which arise from his continued legal ownership--in which case the transferee should be just as able to impose his will on company affairs as if he were registered as the legal owner himself. To illustrate, let us imagine that Company X is given the opportunity to obtain some shares in its market rival, Company Y, and that Company X intends to exercise its voting rights in a manner which will clearly be detrimental to Company Y. The original owner of the shares executes a share transfer form and delivers the share certificates, plus the form, to Company X, which duly informs Company Y of the change in membership and requests an amendment to the company register. The directors of Company Y, recognising that Company X will try to exert a malevolent influence over the company, refuse to register the transfer as it would not be in the bona fide interests of the company. However, applying the rule in *Re Rose,* from the moment the original owner put the transfer beyond his control, Company X becomes the equitable owner of the shares and can now direct the original owner, as its trustee, to do the very things as shareholder which the directors of Company Y were trying to prevent. In such a situation, the effect of the rule in *Re Rose* would therefore be to render the directors' discretion ***Conv. 371*** to refuse to register new members an ineffective shield against the influx of harmful shareholders.[35]

Role of the Trust Mechanism

It seems from the case law that the rule in *Re Rose* operates by recognising that at some point a trust arises over the shares. However, the use of the trust mechanism to perfect the transfer throws up a number of theoretical difficulties, which stem from the fact that the use of the trust in this concept does not fit easily with orthodox trust law. Furthermore, it may result in the opportunity for the claimant to pursue a personal action for breach of trust against an innocent transferor, as well as exert a proprietary claim over the shares.

There are two possible ways of construing a trust over the shares: either the actions of the transferor operate as a declaration of an express trust for the benefit of the transferee, or they create a situation whereby it is appropriate that a constructive trust is imposed over the shares. We shall examine each in turn.

Declaration of an Express Trust

Milroy v Lord,[36] *Re Fry*[37] and *Re Rose*[38] all suggest *prima facie* that in order to perfect a gift the transfer must take effect as a declaration of express trust. It is clear that this construction flies in the face of the fundamental principle that for there to be an express trust there must be certainty of intention on the part of the settlor: executing a transfer form and declaring an intention to transfer legal title to another does not demonstrate intention to create a trust; if anything, it would appear to show a contrary intention as trusteeship is incompatible with transferring legal title of the trust property to another. Indeed, this formed part of the reasoning in both *Milroy v Lord*[39] and *Re Fry*[40] which led to the court rejecting equitable assignment in both cases.

Despite this, disregard for certainty of intention has continued in recent years, notably by the Privy Council in *T Choithram International SA v Pagarini,* [41] where a philanthropic settlor wished to transfer shares and other assets to a charitable foundation of which he was one of the trustees. None of the requisite formalities for the transfer of legal title had been effected; instead the settlor purported to transfer title orally, with the words "I give to the foundation". [42] As the foundation had no legal personality, it being a trust, Lord Browne-Wilkinson held that these words must mean the gift was to the trustees of the foundation to be held as trust property. This meant that, as the settlor was himself a trustee, legal title was already vested in an appropriate person. [43] On any reading it takes a liberal interpretation of the English language to make the leap from a declaration intending to transfer title to the trustees of the foundation to a declaration intending that henceforth title would be held by the settlor as trustee. [44]

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A similarly generous approach to the interpretation of the English language is shown in *Pennington v Waine.* In order to make the facts fit with an agency relationship--which formed the basis of her alternative *ratio* based on estoppel--Arden L.J. was forced to interpret the words "this requires no action on your part" as a declaration of agency by Mr Pennington. [45] Arden L.J.'s judgment suggests that following *Choithram v Pagarini* there is now a general principle of "benevolent construction" which the courts may invoke in order to treat words of gift as a declaration of trust. [46]

Linguistic problems aside, the effect of using an express trust to give effect to the transfer is that the transferor will immediately be exposed to the liabilities of trusteeship, but will be likely to be wholly unaware of this. Admittedly, many of the more onerous duties of trusteeship would be avoided, as the shares will presumably be held under a bare trust and thus the transferor will avoid active responsibilities, such as the duty to invest. However, an innocent transferor could nevertheless find himself liable for breach of trust in a number of ways--for example, if he receives dividends on the shares and spends the money, or if he accepts fees from a directorship for which he is only eligible due to his legal ownership of the shares. [47] Alternatively, the savvy transferor may be well aware that the legal formalities have not been completed and thus feel entitled to change his mind about making the gift in the first place; subsequent disposal of the shares to a third party would then be in breach of trust. In practice, it is likely that these problems could be mitigated by appropriate use of s.61 of the Trustee Act 1925 to relieve the transferor of any liabilities which arise by incidence of his trusteeship; however, it is clearly unsatisfactory to have to relieve liability as a matter of course.

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Creation of a Constructive Trust

The creation of a constructive trust, which is how *Re Rose* is explained by *Corin v Patton* [48] and is the reasoning behind the main *ratio* in *Pennington v Waine,* [49] raises problems of its own, not least the question of whether the conscience of the transferor will always be affected so as to justify this result. [50] That a constructive trust will only arise in circumstances where the conscience of the defendant is affected is confirmed by Lord Browne-Wilkinson in *Westdeutsche Landesbanke v Islington BC* as being "fundamental to the law of trusts", [51] despite some earlier authority to the contrary, such as *Chase Manhatten Bank NA v Israel-British Bank (London) Ltd.* [52] Yet if a transferor fails to effect the gratuitous transfer of legal title but happens to have completed all the formalities required of him personally, it seems strange to say that, without something further, this affects his conscience as such. It is certainly hard to see how his conscience would be any more affected than that of the innocent recipient of a mistaken payment, whose conscience, according to Lord Browne-Wilkinson in *Westdeutsche,* remains unblemished. [53] This point is particularly pertinent when we consider that, just as with the express trust analysis, the potential liability for breach of trust hangs over the transferor's head.

However, the role of the constructive trust in the rule in *Re Rose* may have altered considerably following the main *ratio* in *Pennington v Waine* which introduces the concept of unconscionability as a means of justifying a transfer in equity. Unconscionability is an oft-used term in other areas of equity's influence, [54] though we must be wary of its appearance in a novel context such as this for the term is inherently vague, and in the absence of any attempt at a definition or test it gives the court a wide discretion to interfere in incomplete transactions and render them effective. Arden L.J. made no attempt to limit this discretion, and instead held unconscionability to be a matter which "must depend on the court's evaluation of all the relevant considerations". [55] It has been noted elsewhere [56] that this approach flies in the face of recent attempts to ensure that unconscionability is controlled by strict principles rather than individual notions of justice. [57]

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Nevertheless, by introducing unconscionability as a justification for separating legal and equitable title, *Pennington v Waine* has inadvertently stumbled across a way of utilising the constructive trust in the context of perfecting imperfect gifts without violating elementary trust law: by definition, if the circumstances in which the formalities are not completed make it unconscionable for equity to deny the gift, then the conscience of the transferor will be affected. On this basis it is entirely acceptable that a constructive trust, along with its attendant liabilities, arises.

As *Pennington v Waine* stands, unconscionability is merely a means of departing from the rule that the transferor must do that which is required of him and cannot be done by anybody else before equity will avail him. [58] However, if, in the light of this case, the constructive trust is to be regarded as the basis of the rule in *Re Rose* then it follows that unconscionability must play a more central role in the doctrine, for, as we have seen, this is a prerequisite for any constructive trust. With this point in mind, a reconsideration of the earlier cases suggests that it is in fact entirely possible to view all the situations where equity has intervened to perfect the transfer (with the exception of *Choithram v Pagarini* which relied on questionable express trust reasoning) as being based on unconscionability. In *Re Rose, Midland Bank v Rose* and *Mascall v Mascall* each transferor, by completing those formalities necessary of him personally, created ***Conv. 375** a state of affairs whereby a third party could complete the transfer at law. In doing this, he relinquished the right to stop the legal transfer, and any attempt to prevent its completion would therefore have been unconscionable.

If unconscionability were the trigger for the assignment in equity, then we can say two things about the difficulties which arise in the case of share transfers when the company directors have a discretion to refuse to register the change of ownership. First, if the directors have such a discretion and seek further details from the transferor, it would be unconscionable for him to use such a request for further information as an opportunity to scupper his gift. Viewed in this light, *Re Fry* must be incorrect, as it would have been similarly unconscionable for the transferor to abuse any request for information by the Treasury in this way.

Moreover, if unconscionability were the basis of the rule in *Re Rose* then the risk of abuse so as to circumvent a legitimate refusal by the company directors to refuse to register the transfer could easily be resolved, by constituting unconscionability in such a way as to take into account factors other than simply the conscience of the transferor. The doctrine could operate so as to require the transferee to show not only that the transferor has done such formalities as to place the transfer beyond his reach and thus affected his conscience, but also that there are no countervailing considerations which would render unconscionable the perfection of the gift in equity. Such considerations could take account of any facts which mean that it is not in the bona fide best interests of the company that the transferee becomes owner of the shares either at law or in equity. [59] Support for this approach can be found in other areas of equity. In the context of equitable estoppel, for example, the courts take into account a wide variety of considerations under a broad banner of unconscionability, [60] such as the conduct of the parties [61] or the impact on third parties. [62] An analogy can also be drawn with the trust which arises out of a contract for the sale of land: in general, equitable title will pass when the contract is created and the vendor will hold the title to the land on trust for the purchaser [63]; however, title will not pass and no trust will arise if the ***Conv. 376** circumstances are such that that contract is not specifically enforceable. So, just as equity refuses to recognise that title to land has passed if this would prejudice the rights of a third party, [64] it would seem right that equity should refuse to perfect a share transfer where this would prejudice the company directors by emasculating their legitimate discretion to refuse to recognise the transfer.

On this basis, the effect of *Pennington v Waine* should not be seen as introducing a new exception to the rule against perfecting imperfect gifts; rather it is an opportunity to recast *Re Rose* in a theoretically sound fashion by shifting the focus away from the extent of the formalities completed and onto the conscience of the transferor. In addition, a broad attitude to unconscionability, enabling the courts to take the surrounding circumstances of the transfer into account, would resolve many of the practical problems inherent in the rule as it stands.

Proprietary Claim Without a Constructive Trust

We have noted that, whether express or constructive, so long as the trust mechanism is at the heart of the rule in *Re Rose* a claimant may have a personal action against the transferor for breach of trust, as well as a proprietary claim. Sarah Lowrie and Paul Todd have suggested that it is possible to remove the trust mechanism from the picture altogether, [65] following Lord Browne-Wilkinson's comments in *Westdeutsche* where he states there may be a separation of legal and equitable title without a trust in certain circumstances. [66] This analysis has yet to receive judicial consideration in the context of imperfect gifts, but would be an alternative way of resolving the theoretical difficulties inherent in the rule in *Re Rose*: separating title in this way would presumably operate to give the claimant a proprietary claim over the shares when transferor has done everything required

of him personally to effect the transfer. This analysis does not remove the relevance of unconscionability, which could arguably still form the basis of a personal action against the transferor for breach of trust if a proprietary claim would not lead to a *Conv. 377 satisfactory result: *e.g.* if the shares have been transferred to a bona fide purchaser for value, or their value has dropped significantly by the time the case comes to trial.

Giving Effect to the Transferor's Wishes

The explanation of the rule in *Re Rose* by means of a constructive trust based on unconscionability centres on the idea that the transferee has somehow become entitled to the equitable title, and that it would be wrong to allow the transferor to deny him it. However, in many of the reported cases the transferor made no attempt to prevent the title from passing; in *Pennington v Waine,* for example, Ada wanted nothing more than to see title pass both in equity and at law. This being so, is it possible to argue that the rule should not be about satisfying some entitlement of the transferee, but is simply a means of giving effect to the wishes of the transferor when they would otherwise have been frustrated? If this were the underlying principle, the constructive trust mechanism could not be the basis of the rule, as it is difficult to see why it would now be necessary for the conscience of the transferor to be affected. Instead, one could argue that it would be justifiable to perfect a imperfect transfer where the formalities are "rendered superfluous by forces native to the situation" [67] --*i.e.* in situations where it is clear that the settlor does not need to avail himself of the protection which is usually afforded by the formalities.

This interpretation of the rule in *Re Rose* is problematic for several reasons. First, an analysis based on the idea that some of the formalities may be dispensed with if this does not prejudice the transferor, would seem to *prima facie* suggest that there may be circumstances where it is appropriate that equity perfect a gift even if *none* of the relevant formalities have been carried out, so long as the transferor is otherwise adequately protected. To do so would clearly go much further than any of the case law in this area to date. [68] Although in the context of *donationes mortis causa* (deathbed gifts), by way of comparison, title to property can pass at law without completion of any of the requisite formalities so long as something which represents the legal title is given to the donee, [69] there is a significant additional requirement: namely that the transferor pass away. Whilst many of the transferors in the *Re Rose* case law did in fact die before the cases were heard, none of the decisions turned upon this fact; furthermore, in *Mascall v Mascall* title passed in equity notwithstanding the fact that the transferor was alive and well. Outside the unique circumstances of deathbed gifts, it is difficult to justify interpreting *Re Rose* in such an expansive fashion. Additionally, if the rule were to operate to render the formalities dispensable when the transferor did not need protecting from undue influences, it would be immensely difficult for the courts to determine whether or not the transferor required the protection of the formalities in any given case.

Alternatively, one could argue that, as the rationale is to give effect to the transferor's wishes, there should be an additional requirement that he display a continuing intention that the transfer go ahead. There are echoes of the rule in *Strong v Bird* [70] (as extended by *Re Stewart*) [71] here, which also operates to give effect to the wishes of the frustrated transferor, in the situation where legal title to the subject matter of the failed transfer ends up in the hands of the transferee, on the death of the transferor, as executor of his will. However, under *Strong v Bird* there is the obvious further requirement that legal title ultimately vest in the transferee: if *Re Rose* were to operate such that a continued intention alone could be sufficient to perfect an imperfect gift, it would seem necessary to reconsider the whole area of fortuitous vesting.

If a transferor has failed to formally transfer property during their lifetime but had a clear, continuing intention to do so, legal title may still transfer if:

The transferee later acquires legal title through other means (e.g., becoming executor of the transferor's will).

Conclusion

This article has sought to highlight the theoretical inconsistencies between the existing operation of the rule in *Re Rose* and fundamental trust law theory, by demonstrating that the use of neither the express trust nor the constructive trust in this context is appropriate without a radical reappraisal of our basic understanding of the trust mechanism. The introduction of unconscionability into the mould, following *Pennington v Waine,* has the potential to develop into a flexible way of mitigating the harshness of the legal formalities in the spirit of *Re Rose* but in a manner consistent with accepted trust law theory. However, the *Conv. 379 burden is on the shoulders of the courts to ensure that the concept is not used in such a way as to grant judges an unfettered discretion to perfect imperfect transactions in an arbitrary and unpredictable fashion.

Lecturer in Law, University of Leicester. I would like to thank Professor Mark Thompson and Dr Rebecca Parry for their helpful comments on a draft of this article.

Pennington v Waine

Footnotes

1 [2002] 1 W.L.R. 2075.
2 [1952] Ch. 499.
3 Different formalities apply to the CREST system for the transfer of uncertificated shares in public limited companies, introduced in 1996, where the first two requirements below are replaced with an appropriate amendment to the CREST computer database: Uncertificated Securities Regulation 1995 (SI 1995/3272).
4 Companies Act 1985, s.183(1). In the case of fully paid-up shares, the Stock Transfer Act 1963 provides that execution of certain approved documents will satisfy this requirement notwithstanding directions in the articles of association specifying a particular form (ss.1(1), 1(4)(a), 2(1)).
5 Alternatively, the approval of all the members will suffice: *Re Zinotty Properties Ltd* [1984] 1 W.L.R. 1249.
6 By virtue of Companies Act 1985, s.352(1).
7 *Re Smith and Fawcett Ltd* [1942] Ch. 304.
8 Admission Directive (79/279), Sch.A II(2); Listing Rules, para.3.15.
9 (1862) 4 De G. F. & J. 264.
10 Above, n.9, *per* Turner L.J. at 274-275.
11 [1946] Ch. 312.
12 Defence (Finance) Regulations 1939 (SI 1940/1254), reg.3A, sub-cls (1), (4) (no longer in force).
13 Above, n.9, *per* Turner L.J. at 274.
14 Above, n.11 at 319-320.
15 Above, n.2, *per* Evershed M.R. at 513; *per* Jenkins L.J. at 519.
16 It was found that in *Milroy v Lord,* although ostensibly all formalities except registration had been completed, in fact an incorrect transfer form had been used.
17 [1949] Ch. 78.
18 Above, n.17 at 89.
19 Above, n.1, *per* Arden L.J. para.[63]; *per* Clarke L.J. paras [77] & [117]; *per* Schiemann L.J. para.[118].
20 Above, n.1, *per* Arden L.J. para.[64]; *per* Schiemann L.J. para.[118].
21 Above, n.1, paras [81]-[116].
22 Above, n.1, para.[65].
23 The facts were such that it only matter whether or not the equitable title had passed before April 10, 1943, five days after the delivery of the documents, so the court did not need to specifically address the issue.
24 For example, D. Hayton, *Hayton & Marshall Commentary and Cases on The Law of Trusts and Equitable Remedies* (London, Sweet & Maxwell, 2001) p.243.
25 [1985] 49 P. & C.R. 119.
26 [1990] 169 C.L.R. 540.
27 Above, n.1, para.[94].
28 See below.
29 See further L. Fuller (1941) 41 Colum. L. Rev. 799 at 800-806; A. Gulliver and C. Tilson (1941) 51 Yale L.J. 1 at 3-5.
30 His Lordship himself recognises that this might be so, above, n.1, para.[117].
31 Listing Rules para.3.15.
32 See further L. McKay [1976] Conv. 139 especially at 151-153.
33 Insolvency Act 1986, ss.339 and 341. If the transferor acted with the intention of depriving his creditors, however, the transaction would be caught by s.423, which has the same effect and is not limited to any time period.
34 As these would presumably be held on trust for the transferee.
35 It also possible that the passing of equitable title in this way could also be used to circumvent any competition regulations which prevented persons from holding a certain number of shares in more than one company in a particular industry.
36 Above, n.9, *per* Turner L.J. at 274.
37 Above, n.11, *per* Romer J. at 315-316.
38 Above, n.2, *per* Evershed M.R. at 510.

39 Above, n.9, *per* Turner L.J. at 275.
40 Above, n.11, *per* Romer J. at 316.
41 [2001] 2 All E.R. 492. See further C. Rickett [2001] Conv. 515; D. Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees* (London, Butterworths, 2003) p.148.
42 Above, n.41 at 501.
43 The settlor in his role as trustee would then have a duty to transfer the legal title to all the trustees, but if this did not occur it would not affect the validity of the gift.
44 Lord Browne-Wilkinson justified the decision on the ground that the facts fell somewhere between an attempt to transfer a gift and an express declaration of trust (above, n.41 at 11). In fact, although the transferee was to hold as trustee, as far as the transfer itself is concerned it would seem to be entirely analogous to an attempt to transfer a gift: see C. Rickett, above, n.41 at 518.
45 Above, n.1, para.[67].
46 Above, n.1, para.[60].
47 See further *Re Macadam* [1946] Ch. 73; *Re Dover Coalfield Extension Ltd* [1907] 2 Ch. 76, affirmed [1908] 1 Ch. 65; *Re Gee* [1948] Ch. 284.
48 Above, n.26, *per* Mason C.J. and McHugh J. at 559.
49 Above, n.1, *per* Arden L.J. para.[59].
50 Noted by S. Lowrie and P. Todd [1998] C.L.J. 46 at 47.
51 [1996] A.C. 669 at 705.
52 [1981] Ch. 105.
53 Above, n.51 at 714.
54 For example, equitable estoppel: *E.R. Ives Investment Ltd v High* [1967] 2 Q.B. 379.
55 Above, n.1, para.[64].
56 M. Halliwell [2003] Conv. 192 at 193.
57 For example, *Jennings v Rice* [2003] 1 F.C.R. 501.
58 Above, n.1, *per* Arden L.J. para.[62].
59 Another relevant consideration, for example, might be where the attempted transfer is brought about by undue influence--if equity were to perfect a gift in such a situation it would overlook the role played by the formalities in protecting the vulnerable transferor from manipulation: see further A. Gulliver and C. Tilson, above, n.29 at 4-5.
60 *E.R. Hives Investment v High,* above, n.54.
61 *Crabb v Arun District Council* [1976] Ch. 179.
62 *Sledmore v Dalby* [1996] 72 P. & C.R. 196.
63 *Lysaght v Edwards* (1876) 2 Ch. D. 499.
64 For example, if the transfer would necessitate the breach of an earlier contract to sell to third party: *Willmot v Barber* (1880) 15 Ch. D. 96.
65 S. Lowrie and P. Todd, above, n.50.
66 Above, n.51 at 707.
67 L. Fuller, above, n.29 at 805.
68 Although some authority for this proposition may be found in Clarke L.J.'s *ratio* in *Pennington v Waine,* above, n.1, para.[94].
69 *Re Lillingston* [1952] 2 All E.R. 184.
70 (1874) L.R. 18 Eq. 315.
71 [1908] 2 Ch. 251.

