Completely constituting an inter vivos trust: property rules?

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Case Comment

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T Choithram International SA v Pagarani [2001] 1 W.L.R. 1; [2000] 11 WLUK 880 (PC (BVI))

Conv. 515 The recent decision of the Privy Council, on appeal from the Court of Appeal of the British Virgin Islands, *T Choithram International SA v. Lalibai Thakurdas Pagarani,* [1] raises issues about the perfecting of an *inter vivos* trust. TCP was a very successful businessman of Indian extraction who established an international supermarket business. Most of the business was run under the umbrella of four holding companies in which TCP owned 64 per cent of the shares. TCP used two of these companies as his bankers, in respect of which he built up credits in accounts with them.

TCP was throughout his life a devoted and generous donor to charitable purposes. He wished to set up a charitable Foundation to serve as an umbrella organisation for other charities he had already established. His intention was that this Foundation would receive most of his assets when he died. Various steps were taken in respect of the proposed Foundation prior to TCP's death, but there was a dispute as to whether some of his assets had been effectively settled on the Foundation during TCP's lifetime so as ***Conv. 516*** to remove them from his estate. This issue reached the Privy Council, where Lord Browne-Wilkinson, delivering the advice of the Board, held that there had indeed been an effective transfer of the assets in question "to the foundation".

An initial comment is required. Although the issue was examined in the context of a gift to "the Choithram International Foundation", it must be recalled that a *charitable Foundation* as such has no legal personality in English law. It is not a corporation *per se.* It cannot therefore receive property, because it cannot own property. There is no "Foundation property", nor can assets be "given to the Foundation". "The Choithram International Foundation" was not a legal body as such. Accordingly, whether or not TCP successfully transferred assets "to the Foundation" was to be decided by examining whether the assets had been effectively settled upon a charitable trust to which the name "Choithram International Foundation" had been applied. In

other words, had the assets been transferred to the relevant trustees, so as to conclude a complete constitution of those assets as part of the charitable trust property?

What had TCP done? The evidence established that a draft trust deed had been prepared in 1989, naming TCP and others as the trustees and setting out the charitable purposes to be pursued. The deed remained unexecuted. In 1991 TCP was diagnosed with cancer. In the presence of several witnesses, in London, he executed the trust deed. (The trust deed was executed by the remaining trustees shortly thereafter.) It was what occurred after TCP had executed the deed which was of key importance. Lord Browne-Wilkinson summarised the events thus [2]:

"Immediately after signing the foundation trust deed TCP said certain words. The witnesses varied in their recollection of the details of what was said but all were in substantial agreement. Thus the witnesses recollect him as having said "I now give all my wealth to the trust' or "I have given everything to the trust' or "I'm handing all my gift, all my wealth, all my shares, to the trust' or that he made a declaration of gift of "his shares and wealth to the Choithram International Foundation'. TCP then said to Mr Param [the accountant to TCP's companies] that he, Mr Param, knew what to do and that he should transfer all his balances with the companies to the foundation and his shares as well."

TCP died just over a month after these events. In respect of the account balances of one of TCP's companies, Mr Param, before TCP's death, made changes in the company's books deleting TCP as creditor and substituting "the Foundation". Unfortunately, in ***Conv. 517*** respect of the second company, no such change was made before TCP's death. Nor were any share transfers executed by TCP before his death. As indicated earlier, the issue boiled down to the question whether TCP's intended gift to the Foundation, or more accurately the trustees thereof, had been completed so that the assets were indeed held on the charitable trust or remained in the TCP's personal estate.

The trial judge and the Court of Appeal had applied the reasoning in *Milroy v. Lord,* [3] which in essence is that a gift can only be perfected in equity in one of two ways: *either* by transfer of the relevant asset to the donee, accompanied by an intention in the donor to make a gift; *or* by the donor declaring himself to be a trustee of the gifted property for the donee. These rules apply of course where the donee is intended to take as a trustee. Case law since *Milroy v. Lord* also established that in respect of the first method, transfer to the donee, the donor must have done everything necessary to be done which was within his own power to do in order to transfer the relevant asset to the donee. [4] Furthermore, a failed transfer will not be interpreted as a successful declaration of self as trustee. [5]

The courts below regarded the facts as indicating an intention by TCP to set up a trust *by transfer to the trustees.* They held accordingly that TCP had not effectively vested the assets in all the trustees of the Foundation, in that he had not done all within his power to do so. The consequences of the failure to transfer (that the assets were not trust property at TCP's death) could not be avoided by an alternative reading of the facts such that TCP had constituted himself a trustee (with the consequence that the assets were trust property at his death).

Lord Browne-Wilkinson, however, while appreciating the lower courts' dilemma, suggested that "[a]lthough equity will not aid a volunteer, it will not strive officiously to defeat a gift". [6] TCP was not attempting to establish an outright gift. Saying "I give to the foundation" could only mean "I give to the Trustees of the Foundation trust deed to be held by them on the trusts of the Foundation trust deed". [7] Thus, his Lordship stated, the words "are essentially words of gift on trust". [8] This analysis ("the facts of this case are novel" [9]) apparently meant that the case fell ***Conv. 518*** between the two common forms of gift-making outlined in *Milroy v. Lord,* which meant that it "raise[d] a new point". [10] In that spirit, therefore, it appears his Lordship was able to proceed to deny the logic of the lower courts' finding. It is, with respect, not clear that this was a novel case at all. When the question is whether there has been an effective transfer at all, why is there a difference between "transfer to A, as trustee" and "transfer to A, absolutely"? A trust, after all, is merely one form of gift-making in equity. It requires, *in a transfer on trust scenario,* that there be a transfer. No trust can be effectively and completely constituted without, or before, a transfer. What is there for the trust to bite on? Only at the point of complete constitution (of the trust property) do the trustees' obligations and beneficiaries' rights arise. If the issue is whether there has been a transfer, that is a matter for the law of property, in which equity itself of course plays some role. True, equity moved away from a simple reliance on objective common law rules of property transfer when it embraced (that embrace often assumed to have been begun by *Milroy v. Lord* itself) the notion of a donor having done all that he could do. Indeed, equity even began to soften exactly what that meant, by introducing a more extreme form of subjectivism. This is evidenced by the inaccurate rendition of what Turner L.J. actually said in *Milroy v. Lord,* by Sir Raymond Evershed M.R. in *Re Rose* [11] --note the latter's inclusion of the words "by him", which had not been used by

Turner L.J. However, the key point is that whatever the content of the rule, that rule was to be applied and was applied in *all* cases of property transfers, irrespective whether they were transfers on trust or transfers as outright gifts.

Lord Browne-Wilkinson then went on to imply that the dilemma of the lower courts, that while TCP had intended to vest the relevant property in all the trustees but had only vested it in himself, was in part the result of "an over-simplified view of the rules of equity". [12] The principle was: "Once a trust relationship is established between trustee and beneficiary, the fact that a beneficiary has given no value is irrelevant" [13]; and the second way of gifting recognised in *Milroy v. Lord (declaration of self as trustee)* was premised on this point. Perhaps this is so, but it should not be forgotten that the trust is a relationship concerning property, and property law rules need to be respected too. In the ***Conv. 519*** second method of gifting, the property law rules are easily complied with. But in the first method, transfer, there is a clear and separate property law issue.

In the key paragraph of his opinion determining the appeal, Lord Browne-Wilkinson stated [14]:

"What then is the position here where the trust property is vested in one of the body of trustees, viz. TCP? In their Lordships' view there should be no question. TCP has, in the most solemn circumstances, declared that he is giving (and later that he has given) property to a trust which he himself has established and of which he has appointed himself to be a trustee. All this occurs at one composite transaction taking place on 17 February. There can in principle be no distinction between the case where the donor declares himself to be sole trustee for a donee or a purpose and the case where he declares himself to be one of the trustees for that donee or purpose. In both cases his conscience is affected and it would be unconscionable and contrary to the principles of equity to allow such a donor to resile from his gift. Say, in the present case, that TCP had survived and tried to change his mind by denying the gift. In their Lordships' view it is impossible to believe that he could validly deny that he was a trustee for the purposes of the foundation in the light of all the steps that he had taken to assert that position and to assert his trusteeship. In their Lordships' judgment in the absence of special factors where one out of a larger body of trustees has the trust property vested in him he is bound by the trust and must give effect to it by transferring the trust property into the name of all the trustees."

A number of comments are warranted. First, at the end of the day the case does not fall "between the two common form situations" [15] and is really not novel. In effect, a different conclusion is reached on the 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 trustees. Secondly, is such a construction a legitimate interpretation of the actual evidence? There must be some doubt that it is, as shown by the different view reached by the lower courts. Thirdly, on the face of it, does not the decision breach the principle established in *Milroy v. Lord,* that a failed transfer will not be interpreted as a successful declaration of self as trustee?

Fourthly, there is some odd reasoning required, which throws up a serious question as to his Lordship's conclusion on what TCP really and actually intended. By declaring himself to be one of the trustees only, TCP's obligation is not only that of trustee of the deed's trusts, but a further obligation to transfer the trust property into the names of all the trustees. That of course is what ***Conv. 520*** TCP had originally failed to do. That obligation to transfer must be an imposed obligation, since it cannot have been the obligation TCP assumed. Fifthly, was the trust of which TCP was trustee at his death a "constructive trust", necessarily recognised because he had actually failed to achieve a transfer so as to constitute an express trust, and it would be unconscionable (but to whom?) to allow him later to resile with the result that he or his estate retained the beneficial rights to the property in issue? There seems to be 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 in *Re Rose.* [16] It is this. In *Re Rose,* the transferor was treated as if he had effected a valid transfer of property rights to the transferee because he had done everything necessary to be done by him to transfer the property. But at law the transfer was not effective. The transferee had no legal title. But she had beneficial rights in equity. The transferor was the legal owner, but a trust was read out of the circumstances in favour of the transferee. [17] It must have been a constructive trust.

The uneasy but fundamental mixture of obligation and ownership, of conscience and property rights, is normally hidden in the law of trusts. Every now and then it surfaces. Lord Browne-Wilkinson has been involved in some recent decisions where it has surfaced in acute forms: in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council,* [18] in the context of the very nature of trusts; in *Foskett v. McKeown,* [19] in the context of tracing and claims pursuant thereto; and now in *T. Choithram International v. Pagarani,* in the context of the question "when is a gift completed?"

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summary

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T. Choithram International SA v. Lalibai Thakurdas Pagarani, the Privy Council held that a valid trust could be constituted based on two key elements:

1. Clear intention: TCP expressed a clear intention to give his wealth to the foundation, evidenced by his declaration and instructions to transfer assets to the trust.

2. DO everything necessary (NOT ALL): While the formalities (such as the transfer of all assets to the trustees) were not fully completed before TCP's death, TCP had taken significant steps to effect the transfer, including instructing his accountant to transfer shares and balances. These actions were deemed sufficient to show that TCP had done everything within his power to perfect the trust

Footnotes

1 [2001] 1 W.L.R. 1.
2 At 5.
3 (1862) 4 De. G.F. & J. 264.
4 *Re Rose* [1949] Ch. 78; *Re Rose* [1952] Ch. 499.
5 *Milroy v. Lord, ibid.*
6 At 11.
7 At 12.
8 At 12.
9 *per* Lord Browne-Wilkinson at 11.
10 At 11.
11 The 1952 version, at 510-511.
12 At 12.
13 At 12.
14 At 12.
15 At 11.
16 The 1952 version.
17 At 513 *per* Sir Raymond Evershed M.R. and 518 *per* Jenkins L.J.
18 [1996] A.C. 669.
19 [2000] 2 W.L.R. 1299.

