Cambridge Law Journal, **57(1)**, March 1998, pp. 46–54
Printed in Great Britain

SHORTER ARTICLES

RE ROSE REVISITED

SARAH LOWRIE* AND PAUL TODD†

THE case of *Re Rose, Rose* v. *I.R.C.*[1] is a well-known authority for the significance of the last act; equity treats a gift as complete where the donor has done all in his power to divest himself of the property, and to vest it in the transferees. The Court of Appeal followed a first instance decision, *Re Rose, Midland Bank Executor and Trustee Co., Ltd.* v. *Rose,*[2] whose similar name was purely coincidental. In the earlier case, the unusual provisions of a will made it necessary for one Hook to argue that the transfer of preference shares had taken effect prior to the death of the testator.[3] Jenkins J. held that it had, although registration of the transfer by the directors did not occur until later, because the testator had done all he could to transfer the shares before his death. *Midland Bank* v. *Rose* was approved, obiter, by Lord Wilberforce in *Vandervell* v. *I.R.C.*[4] In *Mascall* v. *Mascall,*[5] it was expressly argued that *Rose* v. *I.R.C.* was wrongly decided, but the authority of the earlier Court of Appeal decision was upheld, so there is little doubt that what has been called "the Rule in *Re Rose*"[6] is correct.

However, there have always been problems with the analysis in *Re Rose*. Both Evershed M.R. and Jenkins L.J. assumed that for the three months after Rose had (in their view) done everything he could to transfer the shares, and the registration of the transfer, which passed the title at common law, he held them

* M.A., LL.B., University College, Swansea.
† M.A., B.C.L., Cardiff Law School.

[1] [1952] Ch. 499.
[2] [1949] Ch. 78.
[3] Under the will, Hook was entitled to the shares only if they had "not been transferred to him previously to [the testator's] death". The residuary legatee argued that there was only an incomplete or inchoate gift by the time of the testator's death, which triggered the proviso but also prevented Hook acquiring the shares *inter vivos:* see [1949] Ch. 78, 88–89, and the fuller explanation of Evershed M.R. [1952] 1 Ch. 499, 511.
[4] [1967] 2 A.C. 291, 330.
[5] (1984) 50 P. & C.R. 119.
[6] *E.g.*, Parker & Mellows, *The Modern Law of Trusts,* 6th ed., by A.J. Oakley, (1994), p. 64.

https://doi.org/10.1017/S0008197300134373 Published online by Cambridge University Press

as trustee.[7] Yet Rose intended only to give away his property; there was no evidence at all that he intended to become a trustee, with the associated onerous burdens. There are clearly problems, therefore, with any analysis which concludes that Rose had declared himself trustee of the property. Arguably, the trust in *Re Rose* was constructive, but the justification for a constructive trust has always been imposition on the conscience of the trustee,[8] and there was no obvious reason to impose on his conscience. Moreover, any trust analysis could leave Rose open to potential liabilities if the shares had declined in value between the last act and the transfer of legal title. Happily, in the case itself, this period was only about three months, but the directors were under no obligation to register the transfer at all,[9] and it is not difficult therefore, to envisage situations where the trusteeship could have lasted indefinitely.[10] There is no obvious justification for imposing in this way on somebody who had merely intended to give his property away. Indeed, many might perceive that equity should look kindly on somebody who wishes to give property to another, and would regard the imposition of trusteeship as perverse.

We now have the opportunity, however, to explain *Rose* v. *I.R.C.* in such a way as to avoid these consequences. In *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.*,[11] Lord Browne-Wilkinson envisaged that legal and equitable title could be separated without all the incidents of trusteeship. He gave as an example the volunteer recipients in *Re Diplock*,[12] against whom a proprietary tracing claim was successfully brought, but who were not trustees, or indeed fiduciaries. Presumably, there is therefore no reason in logic why they should come under any duties at all. Lord Browne-Wilkinson did not expand on the circumstances where this might be appropriate, but we would suggest that it would be where there are good reasons for separating legal and equitable title but also good reasons for refusing to impose fiduciary duties. In *Re Diplock*, legal and equitable title have to be separated because the equitable title has not been defeated by a bona fide purchaser for value without notice, but it is not at all obvious that fiduciary obligations should be imposed upon an innocent volunteer.

[7] [1952] 1 Ch. 499, 510–511, *per* Evershed M.R., 518, *per* Jenkins L.J.; Morris L.J. agreed with both judgments.

[8] Indeed, it is now clear from *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.* [1996] A.C. 669, 705C–F, that conscience is the basis of all trusts, whether or not constructive.

[9] A point made by Jenkins L.J. [1952] 1 Ch. 499, 515.

[10] In the earlier case, *Midland Bank* v. *Rose*, the transfer was executed by the testator in August 1944, but not registered by the company until March 1946.

[11] [1996] A.C. 669, 706H–707E.

[12] [1948] Ch. 465. This analysis of *Re Diplock* implies that Millett J., as he then was, was wrong in *Tracing the Proceeds of Fraud* (1991) 107 L.Q.R. 71, 81, where he argued that the volunteer would be a trustee in the full sense.

https://doi.org/10.1017/S0008197300134373 Published online by Cambridge University Press

We would suggest that *Rose* v. *I.R.C.* can be regarded as analogous; in both situations there are good reasons for legal and equitable title to be separated, but in neither case is there a good justification for trusteeship. We suggest, therefore, that the case should be re-analysed in the light of *Westdeutsche*. The problem with the traditional analysis is that it is all or nothing; any separation of title must be accompanied by all the incidents of trusteeship. The reality is that equity operates in a flexible manner, and that its intervention can give rise to a range of rights and interests, which can be less than full beneficial ownership.

I. Justification for Separation of Legal and Equitable Title in *Rose* v. *I.R.C.*

Rose transferred shares (in an unlimited company) to his wife in consideration of his love and affection for her, and also transferred other shares, the second transfer being expressed to be in consideration of 10 shillings. The transfers could not take effect until the directors had registered it, and this did not occur until exactly three months after Rose had done what was necessary for him to transfer the shares (in March 1943). The issue, on Rose's later death, was whether estate duty was payable; for this question the date of the transfer was crucial, since it was not payable if the transfer had taken effect in March, but was if it had been delayed until June 1943.[13] The Court of Appeal held that the transfer had taken effect, in equity, in March, when Rose had done all in his power to divest himself of the shares and to vest them in the transferees. By implication, because of the wording of the operative legislation, Rose must thereafter have retained no interest in the property.

Rose v. *I.R.C.* followed *Re Rose, Midland Bank Executor and Trustee Co., Ltd.* v. *Rose,*[14] but an immediate problem with *Midland Bank* v. *Rose* is whether the testator had in fact done everything in his power to divest himself of the shares. In *Re Fry,*[15] an otherwise similar case, it was necessary to obtain Treasury consent before any transfer could take place,[16] and although Fry had completed all the necessary documentation to effect the transfer, the Treasury could have asked for further and better particulars, which would have

[13] Section 38(2) of the Customs and Inland Revenue Act 1881, as amended by the Customs and Inland Revenue Act 1889 s. 11, made duty payable on transfers by the testator within twelve months of his death, whether by declaration of trust or otherwise, and also on any transfer made at any time, if the donor retained any interest in the property.

[14] [1949] Ch. 78.

[15] [1946] 1 Ch. 312.

[16] Under Regulation 3A of the Defence (Finance) Regulations 1939, Statutory Rules and Orders No. 1254 of 1940.

https://doi.org/10.1017/S0008197300134373 Published online by Cambridge University Press

required further responses from Fry.[17] *Re Fry* was distinguished in *Midland Bank* v. *Rose,* on the grounds that Fry had not therefore done everything in his power to divest himself of his shares.[18] But arguably the same is true in *Midland Bank* v. *Rose,* since under the articles of association of the company, the directors had a discretion whether to register the transfer. They were therefore perfectly entitled to refuse to effect the transfer, or to ask Rose to persuade them. If they had chosen the latter route, then *Rose* appears to be on all fours with *Fry*. Indeed, in *Midland Bank* v. *Rose,* there was some evidence that the directors were, at one stage, minded to refuse their consent, on the grounds that it was not in the company's interest to consent to the transfer.[19] Had they asked for arguments that it was in the company's interests, then it is very difficult to see any relevant distinction between this case and *Fry*. The same applies in *Rose* v. *I.R.C.*, since under the articles of association of the company, the directors had full and uncontrolled authority to determine who should be admitted from time to time to be a shareholder of the company.[20]

No doubt it is possible to argue that *Fry* is wrong, because the test should be whether the transferor has irrevocably committed himself to the transfer.[21] Arguably, both Fry and Rose had, because if the transfer had been approved, in the former case by the Treasury and in the latter by the directors, the transferor would have been unable to revoke the transaction. However, if equity took the approach that the transfer was to be complete in these circumstances, it would also have to prevent the transferor doing anything to persuade the directors not to register the transfer, or attempting to revoke where further and better particulars were required before the transfer was effected. It would further have to require the transferor fully to co-operate in the provision of further and better particulars. This appears to be a very untidy solution; we would suggest that *Re Fry* is therefore correct, and that both *Midland Bank* v. *Rose* and *Rose* v. *I.R.C.* are therefore questionable, unless some other means can be found of distinguishing *Fry*. It might be thought relevant that since the directors in *Rose* v. *I.R.C.* consisted only of Rose himself and the transferees, they were very unlikely to object, but even this

[17] As Romer J. observed: [1946] 1 Ch. 312, 319.
[18] [1949] 1 Ch. 78, 89.
[19] [1949] 1 Ch. 78, 88.
[20] See note 9 above.
[21] In *Richards* v. *Delbridge* (1874) L.R.Eq. 11, 14, the test for declaration of trusteeship was for the would-be trustee to evince an intention to deal with the property in such a way "as to deprive himself of his beneficial ownership, and to declare that he will hold it for that time forward on trust for the other person". We would suggest that that should also be the appropriate test here, and it clearly suggests an irrevocable commitment.

https://doi.org/10.1017/S0008197300134373 Published online by Cambridge University Press

is uncertain, and if this is the distinction between the cases then there is a problem in deciding where to draw the line.

In spite of our misgivings about whether *Rose* v. *I.R.C.* is correct on its facts, we will proceed on the assumption that Rose had committed the last act, and that in equity the transfer was complete. It seems in any case that our objections would not apply to *Mascall* v. *Mascall,*[22] where the Chief Land Registrar is acting under a statutory duty, and has no general discretion to refuse registration.[23]

A possible justification for equity's completion of the gift is that Rose had received consideration. The consideration in respect of the transfer to Mrs. Rose, the only disposition considered by Evershed M.R.,[24] which was expressed in the instrument to be Rose's love and affection for her, would probably not be regarded as consideration in equity.[25] However, Evershed M.R. also thought it "not without" significance that Mrs. Rose had undertaken to accept the shares, and the attendant unlimited liability.[26] There was therefore arguably a contract to sell the shares, which would have been specifically enforceable. Equity treats as done that which ought to be done, and regards the purchaser as owner from the date of the contract,[27] and this would justify the imposition on Rose of the duties of trusteeship. A similar justification for the decision in *Mascall* v. *Mascall,* which followed *Rose* v. *I.R.C.,* can be found in Browne-Wilkinson L.J.'s judgment in the latter case, where the transfer was expressed to be in consideration of £9,000.[28]

There are, however, serious objections to this analysis. Despite Evershed M.R.'s reference to Mrs. Rose's undertaking, it cannot be said that the case turned on it. Nor is it the normal explanation of the case,[29] and the analysis would in any case significantly limit its application. Indeed, the reasoning cannot even be used to explain

[22] (1984) 50 P. & C.R. 119. See note 5 above.

[23] The general duties of the Chief Land Registrar are set out in ss. 126–127 of the Land Registration Act 1925. See also generally, Gray, *Elements of Land Law*, 2nd. ed., (1993), p. 170. The whole tenor of Browne-Wilkinson L.J.'s judgment in the latter case was that the plaintiff could do nothing to prevent the transfer going ahead: (1984) 50 P. & C.R. 119, 128.

[24] [1952] 1 Ch. 499, 506–507. The other transfer was said to be in consideration of 10 shillings, which would be regarded as consideration in equity; nor would it matter if the consideration was not actually paid, on the view taken by Browne-Wilkinson L.J. in *Mascall* v. *Mascall* (1984) 50 P. & C.R. 119, 126, since the expression in the instrument would preclude the donor from denying that consideration had been received. This is also a possible justification for the decision in the later case.

[25] Otherwise there would have been a complete transfer in equity in *Milroy* v. *Lord* (1862) 4 De G.F. & J. 264, where the transfer was also expressed to be for the love and affection of the transferee.

[26] [1952] 1 Ch. 499, 506. He also observed, at p. 513, that this cast doubt on whether the settlement could truly be said to be voluntary.

[27] As in *Pullan* v. *Koe* [1913] 1 Ch. 9.

[28] See note 24 above.

[29] See, *e.g.*, the explanation in Parker & Mellows, *The Modern Law of Trusts* (n. 6 above) pp. 64–65.

https://doi.org/10.1017/S0008197300134373 Published online by Cambridge University Press

Midland Bank v. *Rose,* as approved by Lord Wilberforce in *Vandervell* v. *I.R.C.*[30] Moreover, the argument may not have worked, because the relevant legislation effectively required the donor to have retained no interest at all in the property,[31] and as Morritt L.J. observed in *Lloyds Bank plc* v. *Carrick,*[32] of trusteeship arising from a specifically-enforceable sale contract, that normally "such trusteeship is of a peculiar kind because the vendor himself has a beneficial interest in the property". The nature of such trusts was also analysed by the House of Lords in *Oughtred* v. *I.R.C.,*[33] where Lord Jenkins' view, at any rate, depended upon the purchaser (of shares) having something less than the full beneficial interest prior to the transfer of legal title.[34] On that basis, therefore, it is by no means certain that the consideration argument works in any event.[35]

The main argument in *Rose* v. *I.R.C.* revolved around the well-known case of *Milroy* v. *Lord,*[36] and, before Roxburgh J. at first instance,[37] around *Richards* v. *Delbridge.*[38] In both these cases the argument had been put that it was impermissible to construe a perfect trust from an imperfect gift, one of the reasons being that the donor had never expressed any intention to become a trustee.[39] Each case is also explicable on a narrower basis, however. In *Richards* v. *Delbridge*, the instrument used by the donor was incapable in any case of transferring legal title. This is also a possible explanation of *Milroy* v. *Lord,* though as Evershed M.R. observed in *Rose* v. *I.R.C.,*[40] Medley "had given a power of attorney to Lord, authorising him to do what was necessary, by following the regulations of the company, to transfer these shares to himself". In the event, however, Lord did not exercise himself of the power of

[30] [1967] 2 A.C. 291, 330. See note 4 above.
[31] See note 13 above.
[32] [1996] 4 All E.R. 630, 637h–j, citing what was then the most recent edition of Megarry and Wade, *The Law of Real Property,* 5th ed., (1984), p. 602.
[33] [1960] A.C. 206.
[34] *Ibid.,* at p. 240. Lords Denning and Keith of Avonholm preferred to base their reasoning on lack of compliance with s. 53(1)(c) of the Law of Property Act 1925, so that the oral sale contract was ineffective to pass any equitable title at all.
[35] In *Lloyds Bank plc* v. *Carrick* itself, the purchaser had paid the entire purchase price and gone into occupation, so that all that remained to do was to transfer the bare legal title. Morritt L.J. (citing *Bridges* v. *Mees* [1957] Ch. 475) expressed the view that in these circumstances the vendor held on bare trust for the purchaser, thereby implying that Mrs. Carrick had a full beneficial interest even prior to the conveyance: [1996] 4 All E.R. 630, 637h. That is not analogous to *Rose* v. *I.R.C.,* where Mrs. Rose had also undertaken unlimited liability, so that it could not be said that all that remained to be done was the transfer of legal title.
[36] (1862) 4 De G.F. & J. 264.
[37] [1951] 2 All E.R. 959.
[38] See note 21 above.
[39] *E.g.,* Sir George Jessel M.R. in *Richards* v. *Delbridge* (n. 21 above) p. 15: "... for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not to retain it in the donor's own hands for any purpose, fiduciary or otherwise".
[40] 1952] Ch. 499, 509.

https://doi.org/10.1017/S0008197300134373 Published online by Cambridge University Press

attorney, and Medley did nothing else himself to perfect his gift, so another explanation of *Milroy* v. *Lord* is that it is analogous to *Re Fry,* in that the donor had not done everything in his power to divest himself of the property. In *Re Rose, Rose* v. *I.R.C.,* Roxburgh J., at first instance, took a narrow view of both *Richards* v. *Delbridge* and *Milroy* v. *Lord.*[41] The Court of Appeal did not discuss *Richards* v. *Delbridge,* but adopted a narrow view of *Milroy* v. *Lord,* limiting it to where the instrument was incapable of passing title.[42] In *Mascall* v. *Mascall,* which entrenched the decision in *Rose* v. *I.R.C.,* Lawton L.J. noted of *Milroy* v. *Lord* both that the deed poll used "was not the kind of transfer which is used for the transfer of shares from one person to another", and that it was also a case where the last act had not been performed.[43] While these narrow interpretations were no doubt possible on the basis of authority, *Rose* v. *I.R.C.* has long been thought to have had the consequence of imposing the onerous burdens of trusteeship on somebody who would probably never have undertaken it.

The problem with the reasoning discussed so far is that it leads to the existence of a trust, with all the attendant fiduciary duties. If it were impossible to separate legal and equitable titles in the absence of a trust, we would contend that the arguments for separating the titles ought not to prevail over the arguments against imposing the fiduciary duties, and that a trust ought therefore not to be imposed. However, *Westdeutsche* provides authority that it is possible to separate titles without any need to impose a trust.[44] That being so, in *Rose* v. *I.R.C.,* on the assumption that the donor really was irrevocably committed to the transfer, the arguments for separating titles are overwhelming, since the only reason why the transfer was incomplete was that the formalities required to transfer title at common law had not been complied with. There are many situations where equity regards a transfer as complete when the only factor standing in the way of that conclusion is the absence of common law formality, and we would suggest that this is another example. An analogy might be a contract for a lease,[45] where the legal formalities required for the creation of the lease have not been complied with, but equity regards the lease as existing from the date of the contract. The analogy differs from *Rose* v. *I.R.C.* in that there are additionally grounds for imposing on the conscience of the landlord, but if the landlord gives the land to a volunteer donee who

[41] [1951] 2 All E.R. 959, 962.
[42] [1952] Ch. 499, 510, *per* Evershed M.R., 517, *per* Jenkins L.J..
[43] (1984) 50 P. & C.R. 119, 123 and 124.
[44] See note 11 above.
[45] *E.g., Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9.

https://doi.org/10.1017/S0008197300134373 Published online by Cambridge University Press

is unaware of the existence of the contract, there is no ground for imposing upon his conscience. Then the analogy with *Rose* v. *I.R.C.* becomes exact, because there is also no doubt that the volunteer is bound by the equitable lease.[46] As in *Rose* v. *I.R.C.*, there are good grounds for separating legal and equitable title, because the title of the lessee has not been defeated by a bona fide purchaser of the legal estate for value without notice, but there are no grounds for imposing on the donee the obligations of trusteeship, as he is unaware of the relevant facts. This case is also on all fours with the volunteer donees in *Re Diplock,*[47] who in Lord Browne-Wilkinson's view were not fiduciaries, although again, there had been a fissure between legal and equitable titles.[48]

II. Conclusion

This re-analysis of *Re Rose* in the light of *Westdeutsche* allows for the desired result of preventing transfers being frustrated by lack of common law formality, while at the same time not imposing onerous duties on somebody who has not accepted them. We can also see in *Westdeutsche,* and other recent cases, a flexibility developing in the types of rights or interests that equity is able to provide. Whereas the Court of Appeal in *Rose* v. *I.R.C.* may have felt constrained to an all or nothing solution, it is no longer the case that only full equitable interests are recognised. Subsequently the House of Lords has developed the concept of the "mere equity",[49] which does not affect third parties at all, and the separation of legal and equitable titles, binding on third parties, but without creating fiduciary duties. Arguably, a different form of equity again was developed in *Barclays Bank plc* v. *O'Brien,*[50] where a third party bank with notice was bound by a wife's equity against her husband. This could not have been a mere equity since a third party was bound, but almost certainly, the wife did not obtain a full equitable interest in the land, since otherwise had the land been registered, the bank would have been bound regardless of notice under section 70(1)(g) of the Land Registration Act 1925.[51] Therefore, another type of interest, whose nature is not yet entirely clear, appears to have been developed by the House of Lords in *Barclays Bank* v. *O'Brien.* A third form of

[46] This is an application of the equitable notice doctrine, but is unaffected by the 1925 legislation since there is no purchaser for value.
[47] [1948] Ch. 465.
[48] [1996] 2 All E.R. 961, 990b.
[49] *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175.
[50] [1994] 1 A.C. 180.
[51] See especially the views expressed by Dixon and Harpum [1994] Conv. 421, 423, in their reply to Thompson [1994] Conv. 140. See also Sparkes [1995] Conv. 250.

https://doi.org/10.1017/S0008197300134373 Published online by Cambridge University Press

equitable interest, which is binding on third parties, but which still falls short of the full beneficial interest, presumably creating more limited fiduciary duties, may have been recognised by the House of Lords in *Oughtred* v. *I.R.C.*[52] More recently still, Lord Browne-Wilkinson in *Westdeutsche* has recognised that legal and equitable titles can be separated without any need to impose fiduciary obligations at all.

Each of the approaches in the previous paragraph has its place in appropriate circumstances, whereas in each case, a full beneficial interest would be inapposite. We therefore welcome the development of increased flexibility which has occurred in this branch of the law, and look forward to greater clarification of the interests recognised in *O'Brien* and *Westdeutsche*.

[52] This was at any rate the basis of Lord Jenkins' reasoning (n. 34 above, and text thereto).

https://doi.org/10.1017/S0008197300134373 Published online by Cambridge University Press