The funds had just over 2 per cent. of the exposures and the amending waiver letter was passed by a majority of nearly 82 per cent. The funds objected that the majority decision was invalid, mainly on the ground that their commitments under the A facility were being used to pay back the loans of the holders of the B facility who were in fact those voting for the majority decision, *i.e.* the majority were enriching themselves at the expense of the minority and this was a fraud on the minority.

The court held that the majority lender decision was valid. There was no bad faith in the sense of injurious ill-will or malice towards the minority. Further, although the funds in the minority were disadvantaged because they had to pay out to the term lenders, this was a commercial decision which the majority were entitled to take, and not manifestly unfair and an oppression of the minority because (amongst other things) there were benefits for all lenders, *e.g.* the potential survival of the group, the payment of a waiver fee and an increased interest rate. The majority had not intended to discriminate against the minority: the allocation of the reductions between the facilities was required by the borrower to improve its cash flow.

The court stressed that, in cases where there were conflicts of interest between classes of creditors, one object of the voting clause was to resolve the conflicts by majority voting and it was unrealistic for lenders to have to educate themselves about the position of other lenders. If all classes had to be treated equally or the majority had to show that the decision benefited each member of the class, then the voting clause would often be paralysed and a small minority could veto the majority.

In political democracies the majority can vote out of vindictiveness and they can also vote for a government which will vengefully redistribute the wealth of the minority rich to the majority poor. In financial democracies the law requires higher standards of fair dealing. While each case will depend on the facts and the motives, the *Redwood* case pitches the standard at a more realistic level.

PHILIP R. WOOD

EXPLAINING *RE ROSE*: THE SEARCH GOES ON?

IT is often stated that equity will not perfect an imperfect gift: failed donative intent will not be construed as a declaration of trust (*Milroy* v. *Lord* (1862) 4 De G.F. & J. 264). The justification, as

https://doi.org/10.1017/S0008197303296306 Published online by Cambridge University Press

recognised by Maitland (*Lectures on Equity*, p. 74), arises from the fundamental difference between donors and trustees. The donor divests himself of all responsibility regarding the property he gives whilst the trustee often assumes onerous fiduciary duties over property. Thus to impose trusteeship upon a would-be donor is to impose an outcome that results in far greater responsibility than the donor anticipated. *Re Rose* [1952] Ch. 499 recognises an exception to this rule, namely that when a donor has done all that only he was able to do to effect a gift at law so that the donee is able to complete the legal transfer by himself, the donor will hold the property on trust for the donee and the gift, although imperfect at law, is effective in equity. Yet *Re Rose* provides no conclusive explanation for this exception. The Court of Appeal, in *Pennington* v. *Waine* [2002] EWCA Civ 227, [2002] 1 W.L.R. 2075, has sought to provide such an explanation.

In *Pennington* the donor purported to give shares in a company to her nephew. At the donor's death the share register had still not been changed. Therefore clearly there had been no transfer of the legal title. Nevertheless the Court of Appeal held that the gift was effective in equity by means of a trust, but did not state clearly whether that trust was express or constructive.

The trust recognised in *Re Rose* was probably a constructive trust lasting only until perfection of the legal title. This trust *creates* an equitable interest in the shares. Contrary to this, in *Pennington*, Clarke L.J. interpreted *Re Rose* as an example of an intentional *transfer* of an equitable interest. An express trust is the outcome of his reasoning. Yet the donor in *Re Rose* was the absolute owner of the shares. There had been no prior separation of the legal and equitable titles. As Lord Browne-Wilkinson pointed out in *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] A.C. 669, 706, where there has been no separation, no equitable interest exists. There was no equitable interest to transfer unless the donor first created it by a declaration of trust. *Re Rose* examined steps taken by the donor to transfer the *legal* title to shares: for example, sending the signed share transfer forms to the company. The donor clearly intended to transfer the absolute title to property. He intended to make a gift, not to declare a trust. Thus Clarke L.J.'s "intentional transfer" interpretation of *Re Rose* in reality advocates construing clear donative intent as a declaration of trust, a contradiction of *Milroy* v. *Lord*. A constructive trust, on the other hand, arises by operation of law, independently of intention, and so avoids this problem.

Furthermore, where there is a *transfer* of an equitable interest then a donee has rights against a donor automatically. He has

https://doi.org/10.1017/S0008197303296306 Published online by Cambridge University Press

received a perfect gift of the equitable title and has no need of equity's intervention to aid him. Interpreting *Re Rose* as a transfer should render all discussion of the principle that equity will not perfect an imperfect gift irrelevant. The very fact that the judgments in *Re Rose* spent so much time discussing the rule and then justifying the aid of equity on the particular facts of the case indicates that it was certainly not considered at the time to be a case of a transfer.

Arden L.J., in *Pennington*, adopted a more hybrid approach, stating at para. [65] that "there could not be a constructive trust until the gift was perfected". Arguably, there is no need for a constructive trust if the gift is perfect, and if the gift is imperfect it is the constructive trust that perfects it in equity, in the interim before perfection at law. Although Arden L.J. appeared, at times, to employ the "intentional transfer" reasoning, at para. [59] and implicitly at para. [64] she seemed to support the idea that a constructive trust created the equitable interest in *Re Rose*.

In *Hurst* v. *Crampton Bros. (Coopers) Ltd.* [2002] EWHC 1375, the next stage in this litigation, Jacob J. stated at para. [36], "[the donor in *Pennington*] has done more than merely give the beneficial interest. She has agreed to give the legal title and provided a form of transfer executed by her", demonstrating again that the trust in *Pennington* was an interim constructive trust pending perfection of the legal title.

It is important to clarify what type of trust is involved since, by virtue of section 53(2) of the Law of Property Act 1925, constructive trusts but not express trusts are exempt from compliance with the formalities provisions of section 53. Furthermore, it affects the factors looked for to justify the finding of the existence of a trust. As discussed previously, an express trust would require evidence of the donor's intention to create a trust whereas a constructive trust could exist without such intention. Yet a constructive trust which arises by operation of law does require an ascertained trigger to cause it to arise.

Both Clarke and Arden L.JJ. agreed that it would have been unconscionable if the donor in *Pennington*, or subsequently her executors, had been permitted to resile from her original gift. Arden L.J. introduced unconscionability as the trigger causing a constructive trust to arise. It had been assumed for the purposes of the decision that there had been no delivery to the company of the signed share transfer form, and, for this part of Arden L.J.'s decision, that the form remained with the donor. Therefore the donor in *Pennington*, unlike the donor in *Re Rose*, had not put the donee in a position to complete the legal transfer himself and hence,

https://doi.org/10.1017/S0008197303296306 Published online by Cambridge University Press

a new test had to be formulated. Arden L.J. was also keen to put the test on a principled basis. However the support that she derives from *T. Choithram International SA* v. *Pagarani* [2001] 1 W.L.R. 1, in formulating a trigger test of unconscionability, is not entirely analogous. The unconscionability discussed in that case resulted from a duty that the donor had because he was a trustee. He had already been construed as declaring himself to be a trustee. In *Pennington* unconscionability is being used to justify imposition of trusteeship.

Interestingly, in *Re Rose*, as in *Pennington*, the donor was not in fact trying to resile from his gift. The challenge came from third parties seeking to upset what the donor still intended, or had intended until death, to be a valid gift. The test is formulated therefore on a hypothetical basis, namely: if the donor had attempted to resile, would equity have permitted this? It is far easier to justify equity's aid when such aid is, in fact, simultaneously realising the intentions of the donor.

The donee in *Pennington* had agreed to become a director in the company, which required a share qualification, and the donor had expressly told the donee that he need not do anything further to secure the transfer of shares. These were the factors that justified a finding of unconscionability. Yet these do not constitute detriment to the donee. In *Banner Homes Group plc* v. *Luff Developments Ltd. (No. 2)* [2000] Ch. 372 two parties agreed that one would buy land and then both would own the land together, as part of a joint venture. The party making the acquisition gained from this agreement by not having the other party as a rival in the buying process. Thus it was unconscionable for this party to renege on the previous agreement, and a constructive trust arose to prevent this. Yet the donor in *Pennington* had not gained anything. So why was equity's preemptive strike, precluding a retraction which had not actually been attempted, justified in the name of unconscionability when the donee had not incurred any detriment in reliance upon the gift and the donor had not gained any benefit? On other facts disclosing genuine unconscionability the imposition of a constructive trust may be justified, but on the facts of *Pennington* and *Re Rose* the search for an explanation continues.

ABIGAIL DOGGETT

FINANCIAL ASSISTANCE: A RESTATEMENT

SECTION 151 of the Companies Act 1985 prohibits the giving by a company of financial assistance for the purpose of the acquisition

https://doi.org/10.1017/S0008197303296306 Published online by Cambridge University Press