Revision Box Questions: Guidance for approach

Revision Box Chapter 5

1. In understanding the significance of Milroy v Lord (1862) 4 De GF & J 264 in transfers of property from one person to another (intended as outright transfers or transfers of nominal legal title to a trustee), consider the key decisions in Jones v Lock (1865) LR 1 Ch App 25 and Richards v Delbridge (1874) LR Eq 11.

   a) Look at the facts surrounding the two cases and the reasons for the decisions reached.

   b) Ensure that you understand why their outcomes followed from application of Milroy.

   c) Relate the results and their reasonings back to the proposition that equity functions so as to provide flexibility and to prevent injustice, and also to protect and support legal rights.

   d) Respond to the proposition that, in the course of carrying out these functions, tensions can arise between supporting the supremacy of legal rights and achieving justice for a claimant.

The importance of Milroy here flows from Turner LJ’s insistence that in order to be valid any transfer of title to property from one person to another must satisfy law’s requirements (which as we saw in the previous chapter are determined by the type of property and not the nature of the transaction), or in absence of this satisfy equity that the owner of property has done all in his power to effect the transfer. In both Jones and Richards there was no effective transfer at law, and because it couldn’t be shown either that the owner of the property had done all in his power to effect the transfer, there was not scope for equity to recognise the transfer, according to the requirements set out under Milroy. We can link this with the supremacy of ownership manifested in legal title underpinning formality requirements- that law will only recognise property has a new owner when formality has been complied with, and equity supports this position through requiring that an owner of property has done all that he can meaning that law’s recognition is merely an outstanding inevitability. That is the basic position as far as protecting legal rights is concerned but the case law has blurred this in different ways; certainly in the much-criticised Pennington v Waine (2002) approach, but the more highly favoured Re Rose approach is also problematic here. It is also so that these cases reveal tensions in the position whereby at some point before a legal owner has done all that he can to effect a transfer of legal title to another that he permanently and irrevocably loses the right to the property in favour of a volunteer recipient (who is either a would be outright owner, or a beneficiary under an express trust).

2. To be sure that you understand the mechanics of a self-declaration of trust and also its implications, after reading the judgment in Pennington, Choithram (T) International SA v Pagarani [2001] 2 All ER 492, read Rickett (2001) 65 Conv 515.

   a) Explain in your own words what you understand to be Rickett’s views on this decision, indicating whether or not you agree, and why.

   b) Consider whether, in your studies of equity’s role in transfers of property, you have encountered any evidence that equity has ever striven officiously to defeat a gift.
c) Consider whether Jones and Richards could be seen as examples of where equity has officiously striven to defeat a gift, or whether you think that these outcomes were the only possible result in the circumstances.

d) Explain, giving reasons for your views, whether you think the courts should adopt a more cautious approach or a more liberal approach to finding that a trust has been constituted.

This requires you to express your views on whether this was a sound decision given the implications of creating an express trust, and how similar creating a trust and making a gift can be, and can be perceived to be, even though their mechanics and effects are quite different. Explaining whether you think equity has ever striven to defeat gifts/creation of trusts requires you to reflect on the cases where we might see equity as being extremely generous such as in Choithram as well as others such as Re Rose and especially Pennington. It also requires you to engage with ‘harsh cases’ cases such as Jones and Richards and if you think they are examples of such unduly harsh decision making to explain why this is so in the light of why law requires transacting with property to be in prescribed form at all, and using this to come to a view on whether the courts should be applying strict approaches or more relaxed ones, and for whom

3. Consider whether you think there are any dangers in adopting an approach that treats making gifts and express trust creation as ‘the same’ (or substantially the same), indicating what these might be.

This requires you to engage with examples of how the cases seem to consider gift making and trust creation in very close proximity, with all the cases mentioned up to now being clear examples of such an approach. This may be justifiable given the similarities surrounding the creation of trusts with making outright gifts, but what about the differences? The creation of a trust is a mandatory arrangement which must be carried out; it is enforceable by persons who have provided no consideration, and imposes duties on another to ensure the settlor’s wishes are carried out. Are these latter factors given sufficient weight in the cases?