



## **This document has been provided by the International Center for Not-for-Profit Law (ICNL).**

ICNL is the leading source for information on the legal environment for civil society and public participation. Since 1992, ICNL has served as a resource to civil society leaders, government officials, and the donor community in over 90 countries.

Visit ICNL's **Online Library** at  
<http://www.icnl.org/knowledge/library/index.php>  
for further resources and research from countries all over the world.

### Disclaimers

**Content.** The information provided herein is for general informational and educational purposes only. It is not intended and should not be construed to constitute legal advice. The information contained herein may not be applicable in all situations and may not, after the date of its presentation, even reflect the most current authority. Nothing contained herein should be relied or acted upon without the benefit of legal advice based upon the particular facts and circumstances presented, and nothing herein should be construed otherwise.

**Translations.** Translations by ICNL of any materials into other languages are intended solely as a convenience. Translation accuracy is not guaranteed nor implied. If any questions arise related to the accuracy of a translation, please refer to the original language official version of the document. Any discrepancies or differences created in the translation are not binding and have no legal effect for compliance or enforcement purposes.

**Warranty and Limitation of Liability.** Although ICNL uses reasonable efforts to include accurate and up-to-date information herein, ICNL makes no warranties or representations of any kind as to its accuracy, currency or completeness. You agree that access to and use of this document and the content thereof is at your own risk. ICNL disclaims all warranties of any kind, express or implied. Neither ICNL nor any party involved in creating, producing or delivering this document shall be liable for any damages whatsoever arising out of access to, use of or inability to use this document, or any errors or omissions in the content thereof.

British Virgin Islands

**T Choithram International SA and Others v Lalibai Thakurdas Pagarani and Others**

Privy Council

Lord Browne-Wilkinson, Lord Jauncey of Tullichettle, Lord Clyde, Lord Hobhouse of Woodborough and Lord Millett  
6 December 1999, 29 November 2000

(1) *Equity – Gift – Completion – Donor's intention – Declaration that assets held on trust – Subsequent draft will containing residuary gifts to trustees – Whether gift revocable.*

(2) *Equity – Trust – Gift to trustee – Imperfect gift – Trust property vested in only one of trustees – Whether trust enforceable – Whether imperfect gift – Whether trustee bound to transfer trust property in name of all trustees.*

The deceased, TCP, had been a successful businessman. He used his some of his companies as his bankers and did not draw profits from them but built up credits on accounts with them instead. Throughout his life he had been very generous in giving money to charities, making gifts amounting to many millions of US dollars. At the trial the judge found that, having made generous provision for his first wife and children, TCP intended to leave much of the remainder of his wealth to charity by setting up a foundation to receive most of his assets when he died. A draft trust deed was prepared in 1989 by M, a firm of solicitors in London. In 1991, with his health failing, TCP decided to sign the deed. In the presence of the First Secretary of the Indian High Commission, two of his sons, his accountant and a friend he signed the deed and said words to the effect that he was giving all his wealth to the trust. He also told his accountant to transfer all his balances with the companies and his shares to the Foundation. The remaining trustees signed the deed shortly thereafter and at later meetings with the Boards of Directors of the companies in question, he restated that he had established the Foundation and transferred his wealth to the trust. However, some time previously, TCP had also instructed another firm of solicitors, CC, to prepare a will for him. The draft will contained a gift of the whole of his estate to a body called the Foundation, although at the time the draft was prepared, the Foundation had not been established. Subsequent to the establishment of the Foundation, TCP was approached on numerous occasions to execute the will which he failed to do and he also failed to execute the documents necessary to carry out the transfer of assets. Thus, no transfer of TCP's shares in the companies was executed before his death and the respondents, his first wife and their children, commenced proceedings. The main issue was whether the gift to the Foundation amounted to an immediate perfected gift of some or all of TCP's wealth and, given that TCP had not vested the gift property in all the trustees of the Foundation, whether the trusts of the Foundation were enforceable or whether there had been an

imperfect gift which could not be enforced against TCP's estate whatever TCP's intentions. The judge found that there was no doubt that TCP had executed the deed and that he had made a gift of all his wealth with the companies to the Foundation. However, on the basis of TCP's refusal to execute the will and his resultant failure to vest the property, the judge went on to find that TCP had not continued his intention to the date of his death and had not intended it to be irrevocable. TCP had not therefore done everything necessary to be done to complete the gift and equity could not complete an uncompleted gift. He further held that it was not possible to treat TCP's words of gift as a declaration of trust because they made no reference to trusts. The gift therefore failed. That decision was upheld by the Court of Appeal of the British Virgin Islands. The appellants appealed.

**HELD:** Appeal allowed.

(1) Once it was understood that the transaction was to be carried through by TCP declaring that he held assets already vested in him as a trustee for the Foundation, there was no ground for inferring that he intended the gift to be revocable or conditional on the transfer of the specific assets. The existence of the testamentary residuary gift to the Foundation in the draft will was not inconsistent with an intention to make an absolute gift within TCP's lifetime but a matter of common prudence. The evidence clearly established an intention to make an immediate and unconditional gift to the Foundation (see p 703, post).

(2) Although equity would not aid a volunteer, it would not strive officiously to defeat a gift. The facts of the case fell between the two common ways of making a perfect gift, viz by a transfer of the asset to the donee with the intention of making a gift or by the donor declaring himself a trustee of the property for the donee. Although the words used—"I give to the Foundation"—were apparently words of outright gift, the Foundation had no legal existence apart from the trust and therefore those words could only be words of gift on trust. Beneficiaries under a trust, although volunteers, could enforce a trust against the trustees. Until comparatively recently the great majority of trusts were voluntary settlements under which beneficiaries were volunteers having given no value. Where the trust property was vested in only one of a body of trustees as in the instant case, where TCP had declared that he was giving property to a trust which he had established and of which he had appointed himself a trustee, there could be no distinction from the case where a donor declared himself a sole trustee for a donee or a purpose. In both cases his conscience was affected and it would be unconscionable and contrary to the principles of equity to allow such a donor to resile from his gift. In the absence of special factors, where one trustee out of a larger body of trustees had the trust property vested in him he was bound by the trust and had to give effect to it by transferring the trust property into the name of all the trustees. Therefore, at TCP's death the deposit balances and the shares in the companies were held on the trusts of the Foundation trust deed and the same had been validly vested in the trustees of the Foundation (see pp 704-706, post). *Bridge v Bridge (1852) 16 Beav 315 distinguished; Milroy v Lord (1862) 4 De GF & J 264 doubted.*

a  
b  
c  
d  
e  
f  
g  
h  
i  
j  
k  
l  
m  
n  
o  
p  
q  
r  
s  
t  
u  
v  
w  
x  
y  
z

Per curiam. It may well be that an immediate declaration of trust even though expressly or impliedly made revocable is a valid complete gift. Many voluntary settlements are expressly made revocable yet are completely constituted trusts. If and so long as the trust remains unrevoked, the trust is enforceable against the trustees and the trust property (see p 704, post).

#### Cases referred to in judgment

- Bridge v Bridge* (1852) 16 Beav 315  
*Milroy v Lord* (1862) 4 De GF & J 264  
*Richards v Delbridge* (1874) LR 18 Eq 11  
*Rose, Re; Midland Bank Executor v Rose* [1949] Ch 78, UK Ch Div  
*Rose, Re; Rose v IRC* [1952] Ch 499, UK CA  
*Strong v Bird* (1874) LR 18 Eq 315

#### Legislation referred to in judgment

International Business Companies Act 1984, s 30

#### Appeal

The appellants, T Choithram International SA and eight others, appealed against the judgment of the Court of Appeal of the British Virgin Islands (Byron CJ (Ag), Satrohan Singh and Redhead JJA) of 8 April 1998, in favour of the respondents, Lalibai Thakurdas Pagarani and six others and upholding the decision of Georges J that the actions of Thakurdas Pagarani ('TCP') shortly before his death were insufficient to constitute a completed gift to the Choithram International Foundation. The facts are set out in the judgment of the Board.

*Michael Briggs QC* and *Stephen Smith* for the appellants.  
*Alan Steinfield QC* and *Stephen Moverley Smith* for the respondents.

29 November 2000. The following judgment of the Board was delivered.

**LORD BROWNE-WILKINSON.** This is an appeal from the judgment of the Court of Appeal of the British Virgin Islands (Byron CJ (Ag), Satrohan Singh and Redhead JJA) given on 8 April 1998 upholding the decision of Georges J that the actions of Thakurdas Choithram Pagarani ('TCP') shortly before his death were insufficient to constitute a completed gift to the Choithram International Foundation ('the Foundation') a philanthropic body created by TCP at the same time as the gift. The case again raises, but with a new twist, the question when is a gift completed.

TCP was born in 1914 in India. He was a devout Hindu. In 1928 he married the first respondent, Lalibai Thakurdas Pagarani, by whom he had six daughters, the second to seventh respondents. In about 1937 TCP left India and eventually established a supermarket business in Sierra Leone. Lalibai and their children remained in India. In Sierra Leone he met and in 1944 went through a ceremony of marriage with Virginia Harding who bore him eight children, including three sons. The fifth and sixth appellants are sons of that union named Kishore and Lekhraj. TCP remained in Sierra Leone

a until the 1980s but used to return to India to visit his Indian family and those members of his Sierra Leone family whom he had taken to India to be brought up according to Indian ways and customs.

b The businesses carried on by TCP were outstandingly successful and spread widely throughout the world. They were usually named 'T Choithram and Sons' and were often known simply as 'Choithrams'. In 1989 TCP brought most of his business under the umbrella of the first four appellant companies which became, in effect, holding companies. He was not the sole owner of the shares in those companies. He owned 64% whilst the eighth appellant Mr Rajwani owned 10%, Ramesh Pohumal Thanwani 10% and his sons Kishore and Lekhraj 8% each.

c TCP used those companies, and particularly T Choithram International SA and Bytco International SA, as his bankers. He did not draw profits out of the companies but built up credits on accounts with those companies. He also established joint accounts in the name of himself and the name of a member of the family. In consequence, after his death the individual family members became the sole owners of their respective accounts.

d TCP throughout his life was outstandingly generous in his charitable giving. His gifts amounted to many millions of US dollars. The judge found that—

e 'having made generous provision for his first wife and each of his children, [he] intended to leave much of the remainder of his wealth to charity, to the exclusion of his children. This he hoped to achieve by setting up a foundation to serve as an umbrella organisation for those charities which he had already established and which would in due course be the vehicle to receive most of his assets when he died. This was from all accounts, a longstanding intention of the deceased'.

f The draft trust deed was first prepared in 1989 by London solicitors, Macfarlanes. The draft reached a final stage in 1990 but was not executed. However, as the judge found, by the end of 1991, with his health clearly failing, TCP apparently finally decided to set up the trust. The judge accepted the evidence that TCP told his son Lekhraj that he would like to sign the trust deed in London and that he had clearly made up his mind to put pen to paper and do everything as quickly as possible.

g The draft trust deed intended to establish the Foundation took the form of a pilot settlement subject to the law of Jersey in the Channel Islands. It was expressed to be made between TCP (defined as the settlor) of the one part and the settlor, Mr Rajwani, Mr Thanwani, Mr Jethwani, two of TCP's sons Kishore and Lekhraj, and a Mr Patel (who are defined as the trustees). It was recited that TCP had transferred £1,000 to the trustees 'to the intent that they should make the irrevocable settlement hereafter contained' and that further property might be paid, transferred or otherwise placed under the control of the trustees. It then provided that during a defined trust period the trustees might apply the income to or for the benefit of the beneficiaries as defined and at the expiration of the trust period should hold the capital for the T Choithram Foundation, the Choithram Charitable Trust, T Choithram Charity Trust Ltd and Choithram Fountain of Humanitarian Services

Charitable Trust in equal shares absolutely, those being four charities which TCP had established during his lifetime. The 'beneficiaries' as defined were TCP and the four charitable institutions just mentioned. Power was given to the trustees (with the consent of the protector, who was TCP) to appoint that the beneficiaries were to include such persons as they might specify.

The Foundation trust deed remained unexecuted until, at the end of 1991, TCP was diagnosed as suffering from cancer. He left his home in Dubai (where he had primarily established himself after he left Sierra Leone in the 1980s) and came to London to stay with his son Lekhraj. As already stated, it was clear that he intended to give his property to the Foundation. Preparations were made for an elaborate ceremony at which he was to establish the Foundation and give it all his wealth. There were summoned to his bedside in Lekhraj's house the First Secretary of the Indian High Commission in London, a Mr Sri Nivasan. In an upstairs bedroom in Lekhraj's house on 17 February 1992 TCP executed the Foundation trust deed in the presence of Mr Nivasan, Lekhraj, Kishore, Mr Rajawani and Mr Param, Mr Rajawani was an old friend and business associate of TCP. Mr Param was the accountant to TCP's companies. 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 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. Again the exact words used are not identically remembered. Mr Param was expressly picked out by the judge as a witness who impressed him as 'reliable and thoroughly trustworthy'. According to Mr Param he was instructed by TCP to 'transfer all my wealth with the companies to the trust'. According to Lekhraj, Mr Param was instructed to transfer to the trust all his balances with the company and his shares as well. Mr Rajawani confirmed that Mr Param was directed that 'all my wealth, all my shareholding, and whatever credit balances, should be transferred to the Choithram International Foundation'.

On that evidence the judge said that he entertained no doubt that TCP executed the Foundation trust deed on 17 February as alleged and that he was equally satisfied that he made a gift of all his wealth with the companies to the Foundation. He also refers to the deceased having made an oral declaration giving 'all his wealth to the Foundation'.

On the same day, 17 February 1992, the other trustees present in London namely Mr Rajawani, Kishore and Lekhraj signed the trust deed. The remaining trustees of the Foundation who were not in London signed the Foundation trust deed shortly thereafter.

On the evening of the same day, 17 February, there were meetings of the Boards of Directors of the four holding companies at TCP's bedside. These were attended by TCP, Mr Rajawani, Kishore and Lekhraj. Minutes were

prepared and kept: the judge found that the meetings did take place. The minutes record that TCP declined to accept the chair and Mr Rajawani was elected as chairman. TCP reported that he had executed the settlement—

'creating the Trust, Choithram International Foundation and gifted all his wealth to it and thus necessitating the Company to make the required entries in its records to evidence and exhibit the change of ownership of the assets from Mr TC Pagarani to the Trustees of the Choithram International Foundation'.

The meetings passed resolutions acknowledging the declaration of a gift of all TCP's wealth to the Foundation and resolved 'that the Company hereby acknowledge and confirm that the trustees of the Choithram International Foundation are henceforth the holders of the shares and assets in the Company gifted to the Choithram International Foundation by Mr TC Pagarani'.

The Memorandum and Articles of the companies contained pre-emption rights for the holders of the remaining 36% of the shares in the companies. Within a week all the other shareholders had executed waivers of their rights. On 24 February there was a meeting of the trustees of the Foundation in London attended by TCP, Mr Rajawani, Lekhraj and Kishore. TCP was elected chairman. He reported that the Foundation had been established and all his wealth had been given to the trust. Amongst the other business transacted it was resolved to go ahead with an eye hospital project in Sierra Leone as agreed with representatives of the Sight Savers Association, a project involving major expenditure of funds incapable of being met by the Foundation without substantial funds having been injected. The minutes were signed by TCP on 29 February at the Wellington Hospital in London to which by that date TCP had been admitted.

TCP had some time previously instructed different London solicitors, Clifford Chance, to prepare a will for him. The draft will contained a gift of the whole of his estate (other than his estate in India) to a body called the Foundation. However, at the time the will was prepared the Foundation had not been constituted. Mr Lock of Clifford Chance visited TCP in Golders Green on 10 January and took instructions directly from the deceased. Mr Lock advised that until the Foundation was established, it would be better for TCP's residuary estate to be bequeathed for general charitable purposes and after the death the executors could then pay over the residuary estate to the Foundation once established. He was instructed to revise the will on that basis and was told that 'in the meantime he and his son would prepare the necessary assignments and transfers for assets to be transferred to' the Foundation. The evidence before the judge showed that Lekhraj on more than one occasion after 17 February tried to persuade TCP to execute a will in the form of excluding his Indian property but bequeathing all his other property to the Foundation established by the deed dated 17 February 1992.

Lekhraj also tried to persuade TCP after 17 February to execute documents which the judge described as 'the forms which were necessary to carry out the transfer of assets'. These documents were not, as that description would suggest, share transfers of the shares in the four companies and formal assignments of the credit balances. There were two documents: one a declaration of trust and the other a memorandum of addition, which had first been prepared in September 1990 and of which further copies were sent by Macfarlanes to Lekhraj on 12

February 1992. The documents so sent required to be updated. Once they did not contain the full number of the trustees nor the proper description of the Foundation trust deed. However, they were amended before they were presented to TCP for his signature. The first document was directed to the first appellant and to the trustees of the Foundation. The document acknowledged and declared that TCP held 1600 fully paid ordinary shares in the capital of the first appellant which were registered in his name in trust for the Trustees and undertook to transfer and deal with such shares as the trustees might from time to time direct. It further recorded that TCP thereby deposited with the trustees the certificate for the said shares and a transfer thereof executed in blank and he thereby authorised the trustees to complete the same, such authority to be irrevocable. He further undertook to account to the trustees for any dividends and gave notice to the directors of the first appellant that he had declared the above trust. The second document directed to the first appellant and to the trustees of the Foundation acknowledged and declared that TCP held his current account with the company in trust for the trustees and undertook to deal with such account as the trustees might direct.

Neither of these documents nor (their Lordships infer) similar documents relating to the other companies in the group were signed by TCP. It was the evidence of Lekhraj that TCP did not sign the documents because he had an aversion to signing such documents and also had been advised that it was not necessary. According to this evidence TCP repeatedly said that he had done his bit, that he had given all his wealth to the Foundation and there was nothing more for him to do.

TCP's daughter, Mrs Sawlani, gave evidence (apparently accepted by the judge) that on about 8 March 1992 (that is to say the day before TCP was admitted to the intensive care unit at the Wellington Hospital) he had said to her 'I have given up everything and I feel very happy now. What I was wanting to do, I finally did it and now everything is for them ...'

It will be remembered that at the first meeting on 17 February TCP had told Mr Param that he, Param, knew what to do and that he should transfer all TCP's balances with the companies and shares in the companies to the trustees of the Foundation. Pursuant to this direction at the end of February Mr Param altered the entries in the books of the first appellant company, deleting TCP as creditor and substituting the Foundation. He was himself unable to make a similar alteration in the books of the second appellant company but left instructions to do so for his assistant Mr Tejwani. Unhappily, Mr Tejwani did not make such alterations until after the death of TCP.

As to TCP's shares in the companies, no transfers were executed by TCP during his lifetime. On 20 June 1992, after the death of TCP, the companies registered the trustees of the Foundation as shareholders, cancelled TCP's share certificates and issued new share certificates.

TCP died on 19 March 1992. On 11 August 1992 Lekhraj obtained a grant of letters of administration to his estate in Sierra Leone. On 19 August 1992 the respondents, being Lalibai and her children, started these proceedings in the British Virgin Islands. On 30 September 1992 the grant in Sierra Leone was rescinded in the British Virgin Islands. In August 1994 there were interlocutory hearings in the British Virgin Islands.

There are separate proceedings giving rise to a separate point of appeal to the Board. Mr Kewlani, purporting to act as attorney for the children of Lalibai, applied in Sierra Leone to revoke the grant to Lekhraj. That application was struck out first, on the grounds that Mr Kewlani was not duly authorised to bring the proceedings but also on the alternative ground that the children of Virginia Harding were legitimate and entitled to participate in TCP's estate to the extent that he was intestate. Subsequently the appellants in the present appeal applied for a stay in the British Virgin Islands of similar proceedings relating to the legitimacy of the appellants. Georges J granted the defendants a temporary stay which was not appealed against. In the present proceedings the judge felt that the plaintiffs were estopped from relitigating the legitimacy issue in the British Virgin Islands by the decision in Sierra Leone. The Court of Appeal reversed this decision. There is an appeal against that part of the Court of Appeal's judgment, but the point was not argued on the appeal, the parties being agreed that that issue should stand over until the appeal on the main point had been decided.

On the main issue the appellants advanced a number of arguments with a view to demonstrating that the gift to the Foundation was an immediate perfected gift by TCP of all or some of TCP's wealth. Their primary argument was that TCP, having executed the Foundation trust deed under which he was one of the trustees and made a gift of all his wealth to the Foundation, thereafter held all his assets (or at least his shares in and deposits with the British Virgin Island companies which are the first four appellants) as trustee on the trusts of the Foundation trust deed. The appellants also had a number of alternative arguments. First they argued that the principle in *Strong v Bird* (1874) LR 18 Eq 315 entitled them to succeed because a grant of letters of administration to the estate of TCP had been obtained by Lekhraj, one of the trustees of the Foundation. Next they argued that, as to the sums deposited with the companies, those companies had assigned to the trustees of the Foundation when Mr Param or Tejwani made the changes to the companies' books. Next, they submitted that TCP's words and actions amounted to an equitable assignment of the deposits with the companies to the trustees of the Foundation, or alternatively constituted a release by TCP to the companies in consideration of the companies' undertaking contractual obligations to pay the trustees of the Foundation a similar sum. Finally, the appellants repeated their argument before the judge that the trustees were validly registered as shareholders in the company either because of certain provisions in the Articles of the company or under s 30 of the International Business Companies Act 1984. Their Lordships will deal first with the main argument since, in their view, that is sufficient to dispose of the appeal.

In order to have made an effective gift of his shares and deposit balances to the Foundation, TCP must have intended to make an immediate gift on 17 February. The judge found, and repeated his finding on a number of occasions throughout the judgment, that on that date TCP did make, or attempted to make, a present, immediate and unconditional gift to the Foundation which was intended to be complete. This finding, if it had stood alone, would have been fully sufficient to establish TCP's intention to make an outright gift. However, at a later stage in his judgment the judge made a further finding. At this stage in the judgment the judge was seeking to answer the second question of fact left to him by counsel for decision (viz did TCP continue his intention of gift down to the date of death?) a

question only relevant to the *Strong v Bird* argument. The judge reviewed the evidence as to the events occurring after the oral declaration of trust on 17 February and was very impressed by two elements in the evidence: first, that despite Lekhraj's promptings, TCP refused to sign the further documents put before him and, second, that by the draft will (which he never executed) TCP expressly excluded his Indian property (which had been the home of Lalibai) and also contained a gift of his estate to the Foundation. He reached the conclusion that the gift was not intended by the deceased to be irrevocable.

Their Lordships do not feel able to accept the judge's inference that TCP intended the gift to be revocable. First the judge quotes a passage from the affidavit of Mr Lock of Clifford Chance saying that TCP was intending 'to prepare the necessary assignments and transfers for the assets to be transferred to the Choithram International Foundation'. Now Mr Lock and Clifford Chance were concerned not with the setting up of the Foundation, but only with TCP's will: the setting up of the Foundation was being dealt with by different solicitors, Macfarlanes. The only evidence of the further documents which Macfarlanes envisaged were the draft documents which were sent to Lekhraj by fax from Macfarlanes on 12 February 1992. These documents were not share transfers or deeds of assignment: they were declarations of trust by TCP in favour of the trustees of the Foundation and notices of addition to the funds settled by the trust deed to be executed by the trustees. Therefore, so far as the evidence extends, it was always the intention of TCP and his relevant legal advisers that the Foundation should be constituted by the following steps. First, TCP would declare the Foundation trust by a trust deed, he and others being the trustees; second, TCP would declare himself as holding his assets on the trusts of the Foundation trust deed; third, the other trustees would accept the gift as an addition to the trust fund constituted by the trust deed. Thus the machinery actually adopted was the same as that proposed by Macfarlanes save that the written declaration of trust was replaced by an oral immediate gift not to a person but for an abstract purpose, i.e. for the purposes of the Foundation. A gift for 'the Foundation' can only properly be construed as a gift to the purposes declared by the trust deed and administered by the trustees.

The judge's doubts were also raised by the fact that TCP, an experienced businessman, was acting in defiance of his lawyers' advice 'with whom he had remained in close consultation'. There is no evidence of recent direct communication between TCP and Macfarlanes: the only evidence is the fax of 12 February which was sent not to TCP but to Lekhraj. The fact is that TCP was in his last illness as a result of which he went into intensive care on March 9th and died 10 days thereafter. The judge also seemed far from clear as to the nature of the documents sent by Macfarlanes on 12 February which formed the basis of the documents the signature of which Lekhraj was seeking from TCP. The judge refers to TCP having 'the continuing intention of transferring assets by way of instruments of transfer' and 'the transfer of shares ... [remaining] unsigned'. The judge seemed to have thought that the documents would actually have vested the legal interest in the deposits and

a the shares in the trustees whereas the new documents, even if executed, were to have done no more than constitute TCP as trustee for the whole body of trustees of the Foundation.

b Finally, on this aspect of the case their Lordships do not attach such importance to the will as did the judge. It is certainly true that if the gift of all his wealth was valid TCP, by executing the will would not have provided for his widow and daughters in India by leaving them the land: this is a real factor to be taken into account. But their Lordships do not, as did the judge, attach importance to the draft will containing a residuary bequest to the Foundation by reference to the trust deed dated 17 February. There is no evidence that TCP had anything to do with the instructions for this will (beyond refusing to sign it) and in any event it would have been common prudence for TCP to execute a will giving to the Foundation anything which the inter vivos trusts had failed to attach: their Lordships do not consider the existence of the testamentary residuary gift to the Foundation as in any way inconsistent with TCP having intended to make an absolute gift in his lifetime.

d For these reasons their Lordships are of the view that the judge in reaching his inference that the 'gift' to the Foundation was revocable was labouring under important misapprehensions. Their Lordships consider that once it is understood that, in any event, the transaction was to be carried through by TCP declaring that he held assets already vested in him as a trustee for the Foundation, there is no ground for inferring that the gift was intended by TCP to be revocable or conditional on the transfer of the specific assets. In the light of all the other evidence pointing (as the judge found) quite clearly to an intention to make an immediate, unconditional gift to the Foundation, their Lordships are satisfied that that was TCP's intention. Perhaps the most telling evidence of all is the minutes of the companies' meetings on the evening of 17 February. The respondents launched an attack on the genuineness of the minutes but they were upheld as genuine by the judge. They record that the directors of each of the four companies, who in each case included TCP, 'acknowledge and confirm that the trustees of the [Foundation] are henceforth the holders of the shares and assets in the Company gifted to the [Foundation] by Mr TC Pagarani'. Those minutes were signed by TCP. It is hard to imagine a clearer statement of what TCP understood to be the position, i.e. that he had already given outright to the Foundation all his interests in the company balances and the shares.

g In fairness to the judge, it does not appear that his decision that there was here no complete gift was based on the fact that in his view the gift was revocable. He founded his decision on the ground that the requirements laid down in *Milroy v Lord* (1862) 4 De GF & J 264 had not been satisfied. It may well be that an immediate declaration of trust even though expressly or impliedly made revocable is a valid complete gift. Many voluntary settlements are expressly made revocable yet no one suggests that they are incompletely constituted trusts. If and so long as the trust remains unrevoked, the trust is enforceable against the trustees and the trust property. But it is unnecessary to decide that point.

a

b

c

d

e

f

g

h

i

Their Lordships then turn to the central and most important question: on the basis that TCP intended to make an immediate absolute gift 'to the Foundation' but had not vested the gifted property in all the trustees of the Foundation, are the trusts of the Foundation trust deed enforceable against the deposits and the shares or is this (as the judge and the Court of Appeal held) a case where there has been an imperfect gift which cannot be enforced against TCP's estate whatever TCP's intentions.

The judge and the Court of Appeal understandably took the view that a perfected gift could only be made in one of two ways, viz: (a) by a transfer of the gifted asset to the donee, accompanied by an intention in the donor to make a gift; or

(b) by the donor declaring himself to be a trustee of the gifted property for the donee. In case (a), the donor has to have done everything necessary to be done which is within his own power to do in order to transfer the gifted asset to the donee. If the donor has not done so, the gift is incomplete since the donee has no equity to perfect an imperfect gift: *Milroy v Lord* (1862) 4 De GF & J 264, *Richards v Delbridge* (1874) LR 18 Eq 11, *In re Rose*; *Midland Bank Executor v Rose* [1949] Ch 78, *In re Rose*; *Rose v Inland Revenue Commissioner* [1952] Ch 499. Moreover, the court will not give a benevolent construction so as to treat ineffective words of outright gift as taking effect as if the donor had declared himself a trustee for the donee: *Milroy v Lord*. So, it is said, in this case TCP used words of gift to the Foundation (not words declaring himself a trustee); unless he transferred the shares and deposits so as to vest title in all the trustees, he had not done all that he could in order to effect the gift. It therefore fails. Further it is said that it is not possible to treat TCP's words of gift as a declaration of trust because they make no reference to trusts. Therefore the case does not fall within either of the possible methods by which a complete gift can be made and the gift fails.

Though it is understandable that the courts below should have reached this conclusion since the case does not fall squarely within either of the methods normally stated as being the only possible ways of making a gift, their Lordships do not agree with that conclusion. The facts of this case are novel and raise a new point. It is necessary to make an analysis of the rules of equity as to complete gifts. Although equity will not aid a volunteer, it will not strive officiously to defeat a gift. This case falls between the two common form situations mentioned above. Although the words used by TCP are those normally appropriate to an outright gift—'I give to X'—in the present context there is no breach of the principle in *Milroy v Lord* (1862) 4 De GF & J 264 if the words of TCP's gift (ie to the Foundation) are given their only possible meaning in this context. The Foundation has no legal existence apart from the trust declared by the Foundation trust deed. Therefore the words 'I give to the Foundation' can only mean 'I give to the trustees of the Foundation trust deed to be held by them on the trusts of Foundation trust deed'. Although the words are apparently words of outright gift they are essentially words of gift on trust.

But, it is said, TCP vested the properties not in all the trustees of the Foundation but only in one, ie TCP. Since equity will not aid a volunteer, how can a court order be obtained vesting the gifted property in the whole

a body of trustees on the trusts of the Foundation? Again, this represents an over-simplified view of the rules of equity. Until comparatively recently the great majority of trusts were voluntary settlements under which beneficiaries were volunteers having given no value. Yet beneficiaries under a trust, although volunteers, can enforce the trust against the trustees. Once a trust relationship is established between trustee and beneficiary, the fact that a beneficiary has given no value is irrelevant. It is for this reason that the type of perfected gift referred to in class (b) above is effective since the donor has constituted himself a trustee for the donee who can as a matter of trust law enforce that trust.

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.

The respondents relied on the decision of Sir John Romilly MR in *Bridge v Bridge* (1852) 16 Beav 315 as showing that the vesting of the trust property in one trustee, the donor, out of many is not sufficient to constitute the trust: see (1852) 16 Beav 315 at 324. Their Lordships have some doubt whether that case was correctly decided on this point, the judge giving no reasons for his view. But in any event it is plainly distinguishable from the present case since the judge considered that the trust could not be fully constituted unless the legal estate in the gifted property was vested in the trustees and in that case the legal estate was vested neither in the donor nor in any of the other trustees.

Therefore, in their Lordships' view the assets, if any, validly included in TCP's gift to the Foundation are properly vested in the trustees and are held on the trusts of the Foundation trust deed.

What then are the gifted assets? It will be recalled that TCP referred to the subject matter of the gift in a number of different ways: 'all my wealth', 'everything', 'all my wealth, all my shares, to the trust', 'all his balances ... with the company ... and his shares as well', 'all my wealth with the companies'. The judge found that TCP made a gift of all his wealth with the companies, ie the deposit balances and the shares in the four appellant

a companies which together constitutes his whole wealth in the British Virgin Islands and are the only assets at issue in these proceedings. It was submitted that a gift of 'all my wealth' was void for uncertainty. Their Lordships express no view on that point since there can be no question but that the deposit balances and the shares in the four companies were identified by TCP as being included in the gift and the gift of them is *pro tanto* valid.

b Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed and the action dismissed on the grounds that at TCP's death the deposit balances and the shares in the companies were held on the trusts of the Foundation trust deed and the same are now validly vested in the trustees of the Foundation.

Solicitors:

*Irvings* for the appellants.

*Withers* for the respondents.

SOAS LIBRARY