IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 352 OF 1994

RE THOMAS DESULME (deceased)

HUGUES DESULME	PLAINTIFFS
CLAUDE DESULME	
YVON DESULME	
MYRTHA DESULME	
V.	
JEAN MARIE DESULME	DEFENDANTS
JEFFREY PATTINSON	

Dr. Lloyd Barnett and Andrew Rattray instructed by Christopher Kellman of Rattray, Patterson & Rattray for 2nd, 3rd and 4th Plaintiffs.

R.N.A. Henriques, Q.C. and Mrs. Maxine Palomino instructed by Levy, Gordon, Palomino & Co. for the Defendants

May 19, 20; October 14, 15, 16, 28 and 30, 1997 and February 5, 1998

CLARKE, J

The plaintiffs are residuary legatees under the will of Thomas Desulme who died on 9th December, 1993. They are expressed to be beneficiaries under a deed of settlement executed by him on 6th October, 1993 some two months prior to his death.

The residuary estate includes the corpus of the assets included in the settlement, namely, 902,988 shares of Thermoplastics (Jamaica) Limited and 74,998 shares of Eaton Hall Development Company Limited. This is plainly the case, for it is common ground that the settlement, even if held to be completely valid, does not purport to dispose of the corpus of the trust fund. Accordingly, there is a resulting trust for the settlor. On his death the defendants **qua** executors of his will hold a vested interest in the shares of the two companies. That vested interest therefore passes to the residuary legatees under the will.

Nevertheless, the vested interest is subject to the settlement provided that the validity of the latter, which the plaintiffs impugn, is upheld. The questions the plaintiffs therefore seek to have determined on the originating summons herein are:

1. whether the deed of settlement is bad on the ground that the trusts it seeks to create are incomplete;

2. whether the deed of settlement is void for offending the rule against perpetuities;

3. whether the trusts which the deed of settlement seeks to create are void on the basis that they conflict with the principle of company law that the management of the company is vested in the board of directors.

Now, the settlement purports to vest in the defendants, as trustees, possession of the capital and income of the trust fund, namely, the shares in the two companies referred to in the settlement: Clause 3. Under Clause 5 the trustees are empowered to accumulate the "whole or any part of the income of the Trust Fund" in accordance with the provisions of that Clause. Furthermore, the trustees are directed to use the capital of the trust fund, viz, the said shares, in the manner prescribed in Clause 3 and 4 of the settlement.

Dr. Barnett has submitted that the entire settlement is void and unenforceable because:

(a) the provisions of Clause 3 in relation to the purported trusts constitute an unlawful fetter on the right of the registered owner of shares and the powers of directors of a company as conferred by the Companies act;

(b) the provisions of Clause 5 as to the accumulating of income (and for the dividing of any part thereof) are void for remoteness;

(c) there was, in any case, no effectual transfer of the shares to the trustees of the settlement prior to to the settlor's death and there is no equity to perfect an imperfect gift.

Question as to the contravention of company law

Clause 4 prescribes as follows:

> "The Trustees shall stand possessed of the stocks and shares in Thermoplastics (Jamaica) Limited ("Thermoplastics") and Eaton Hall Limited ("Eaton Hall")... and the parcel of land described in the Third Schedule ... for the trust period upon the following trusts:
>
> A. to exercise and cast the votes to which he is entitled as the majority shareholders in the Companies in order to ensure that:
>
> (i) the Settlor shall, so long as he shall live, be and remains the Chairman of the Companies;
>
> (ii) Jean Marie shall, so long as he shall live, shall hold the office and exercise the powers of Managing Director and Chief Executive Officer of the Companies;
>
> (iii) the Companies continue to pay to the Settlor so long as he shall live, all dividends, salary, perquisites, bonuses and other benefits and emoluments which he has received in the past and as he may request or direct in the future;
>
> (iv) ensure that the Companies continue to pay to Jean Marie the salary, perquisites, bonuses and other benefits and emoluments which he has been accustomed to receive for performing the functions of Managing Director and Chief Executive Officer of Thermoplastics and any increases in salary, benefits and emoluments to which he may reasonably be entitled as may be determined by the Board of Directors of Thermoplastics from time to time;
>
> (v) so long as they shall live provide to each of the persons who constitutes the first appointed class such salaries, wages allowances, perquisities or other benefits as the Companies have provided to them in the past, save and except for my wife Juliette Desulme who shall

be paid the monthly sum of One Thousand Five Hundred United States Dollars (US$1,500.00);

(vi) each of the settlor's children and Maurice's children shall either be employed to Thermoplastics or receive directly or indirectly from Thermoplastics such salaries, wages, allowances, perquisites or other benefits as Thermoplastics is at the date of this Deed providing;

B. Upon the death of the Settlor to cast the votes to which he is entitled as the majority shareholder in the Companies in order to ensure that:

(i) the Companies continue to pay to Jean Marie the salary, perquisites, bonuses and other emoluments which he has been accustomed to receive for performing functions of Managing Director and Chief Executive Officer of Thermoplastics and any increases in salary and emoluments to which he may reasonably be entitled as may be determined by the Board of Directors of Thermoplastics from time to time;

(ii) so long as they shall live provide to each of the persons who constitutes the first appointed class such salaries, wages, allowances perquisites or other benefits as the Companies have provided to them in the past;

(iii) each of the Settlor's children and Maurices's children shall be employed to Thermoplastics and/or receive directly or indirectly from Thermoplastics such salaries, wages, allowances, perquisites or other benefits as the Company is at the date of this Deed providing.

C. Upon the death of the Settlor and the last surving member of the first appointed class to hold the shares in the Companies in nine equal parts on the following trusts and to ensure that:

(i) Jean Marie shall, so long as he shall live, continue to hold the office and exercise the position of Managing Director and Chief Executive Officer of the Companies;

(ii) ensure that the Companies continue to pay to Jean Marie the salary, perquisites, bonuses and other emoluments which he has been accustomed to receive for performing the functions of Managing Director and Chief Executive Officer of Thermoplastics and any increases in salary and emoluments to which he may reasonably be entitled to as may be determined by the Board of Directors of Thermoplastics from time to time;

(iii) each of the Settlor's children and Maurice's children shall either be employed to Thermoplastics or receive directly or indirectly from Thermoplastics such salaries, wages, allowances, perquisites or other benefits as Thermoplastics is at the date of this Deed providing".

So, it is plain that the scheme of arrangement concerning aspects of the running of the companies is, as Dr. Barnett put it, integrally bound up in the settlor's disposition of his property and is heavily dependent on the maintenance during the "trust period" of a set of managerial and personal arrangements in the interests of those beneficiaries specifically named.

The settlement attempts, as witness the particulars of Clause 4, to control for the duration of the trust period important aspects of the management of each company in the following respects:

(1) before the settlor's death, to control the appointment of the chairman of the board, the tenure of the office of managing director, the payment of salary to the settlor and the employment and payment of others; and

(2) after the settlor's death to ensure the employment of and payment of emoluments to predesignated persons.

Mr. Henriques Q.C. sought to meet Dr. Barnett's characterisation of these directions as illegal by submitting that if they are illegal they may be ignored by the trustees as being not binding upon them.

The point, however, is this: if the directions are illegal, the trusts created by Clause 4 are illegal and the question arises whether any valid trust is created by the settlement. In the first place Clause 4 in its imperative language contains directions that are, indeed, illegal. The Clause constitutes an unlawful fetter on the powers of the directors of the companies as conferred by the Companies Act because the Clause:

(a) requires that particular directors be retained in office for the rest of their lives contrary to the Companies Act: see section 175;

(b) purports to nullify the managerial powers and discretions of the Board contrary to the articles of association see articles 84 and 86 (Thermoplastics), article 87 (Eaton Hall).

(c) circumscribes and controls the responsibilities, discretion and powers of the directors contrary to the general principles of company law - see, for instance **Automatic Self-Cleansing Filter Syndicate Co. v. Cunninghame** [1906] 2 Ch. 34 (C.A.) where the articles were held to constitute a contract by which the members had agreed that "the directors and the directors alone shall manage".

In the second place Clause 4 is the very foundation of the scheme of the settlement whereby the trustees are enjoined to stand possessed of the shares for the specific purpose of ensuring that the companies retain as employees on the terms indicated, the persons identified in that clause. In order to fulfil that requirement the trustees are enjoined to control the Board so as to put the directors upon terms that they are bound to act in accordance with the settlor's manifest intention set forth in the said clause.

Therefore, as Dr. Barnett points out, duties are imposed on the trustees to ensure that things are done in a manner which would fetter the discretion of the directors and usurp their powers of management. In this connnection the following dictum of Lord Denning's in **Boulting v. Association of Cinematograph Television and Allied Technicians** [1963] 2 Q.B. 606 at 626 cited by Mr. Henriques, so far from assisting the defendants, supports the plaintiff's contention that the directions in question are unlawful and so vitiate the trusts:

> "Or take a nominee director, that is, a director of a company who is nominated by a large shareholder to represent his interests. There is nothing wrong in it.

> It is done every day. Nothing wrong, that is, so long as the director is left free to exercise his best judgment in the interests of the company which he serves. But if he is put upon terms that he is bound to act in the affairs of the company in accordance with the directions of his patron it is beyond doubt unlawful ..."

It is to be observed that Clause 5 is made subject to Clause 4, for Clause 5 begins thus: "Subject to the foregoing". On that basis, Dr. Barnett's submission - that where, as here a gift (see Clause 5(2)) is dependent on a prior gift (see Clause 4) and the prior gift fails then the dependent gift fails - has much to recommend it and I accept that submission.

That apart, the question whether the provisions of Clause 5 of the settlement offend the rule against perpetuities and, if so, whether the settlement in whole or in part is void, must now be addressed.

Clause 5 of the settlement provides as follows:

> "Subject to the foregoing the Trustees shall stand possessed of the income of the Trust Fund upon and with the following trusts and powers:
>
> (1) to accumulate the whole or any part of the income of the Trust Fund by investing the same in such securities as they in their absolute discretion may deem reasonably secure ... or by lending or investing same in the companies or any subsidiary of the companies from time to time and holding same as an accretion to or augumentation of the capital of the Trust Fund and as one Fund therewith for all purposes, and/or in their absolute and uncontrolled discretion they may:
>
> (2) divide any part of the income of the Trust Fund not paid or applied under the provisions of the sub-clause (1) of this clause into ten equal parts and pay one part to each of the nine persons named in the Second Schedule and divide the remaining part into three equal shares and pay one such share to each of Maurice's children. Upon the death of any of the beneficiaries other than the Settlor and the persons in the first appointed class, the shares of such deceased beneficiary shall be divided **per stirpes** among the issue of such deceased beneficiary;
>
> (3) sell the said land at such time and upon such terms and condition as they may think fit".

Clause 3 stipulates that the "Trustees shall stand possessed of the capital and income of the stocks and shares and investments

in the trust fund for the trust period". And to that end Clause 5 empowers the trustees to accumulate in the manner therein set forth, the income of the trust fund for the "trust period" and in their absolute discretion divide the residue, if any, on the terms stated in sub-clause 2 of that clause.

The "trust period" which delimits the perpetuity period in the settlement

> "means the period from the date hereof until the first to happen of the following events:
>
> (a) the expiration of eighty years from the date of this deed (which period shall be the perpetuity period for the purposes of this deed and of any appointments made hereunder).
>
> (b) the death of the last survivor of the beneficiaries alive at the date hereof": see Clause 2.
>
> (underlining for emphasis)

The mothers of the settlor's children comprise the first of two classes of beneficiaries created by the Deed. The second class is stated to "mean and include the Settlor's wife and children and Maurice's children" living at the date of the settlement. Yet, in the actual dispositions the second class is expanded to include all "the beneficiaries" who are defined as meaning and including:

> "the Settlor's wife and children and all their issue whether now living or to be born hereafter and any children they may adopt, the Settlor and the first appointed class and the expression "a beneficiary" shall have a corresponding meaning": see Clause 2.

Now, the common law rule against perpetuities is correctly stated thus:

> "No interest [in property] is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest:" **Gray, The Rule Against Perpetuities.**

The interest is void if it might vest outside the period. The common law rule is part of Jamaican law. In England, the Perpetuities and Accumulations Act, 1964 modified the common law and provided that the perpetuity period may be a fixed period not exceeding 80 years.

Plainly relying on this statute which is inapplicable in Jamaica, the draftsman of the deed of settlement fashioned the

definition of "the trust period". In that definition the expiration of eighty years from the date of the Deed is expressed to be the perpetuity period for the purposes of the Deed. He should have advised himself that the rule requires that the interest must be incapable of becoming vested outside the perpetuity period of any life or lives in being plus twenty-one years and any period of gestation: see **Hals. Laws of England 4th ed. Vol. 35 paras. 908, 931.** The persons whose lives may be used to measure the period must be mentioned expressly or by implication in the Deed. The children of Maurice and indeed, all the children of Thomas are lives in being. But, as Dr. Barnett points out, all the children and grand-children of the settlor's children and the issue of Maurice are not bound to be born within twenty-one years of Thomas's death or 80 years of the execution of the Deed. And a gift to the grand-children of a living person or the issue of a deceased or living person is bad unless the class is limited, for the living child or grand-child might have another child or a child after the date of the gift and thus more than twenty-one years after all those alive at the date of the gift had died and that child might have another child: see **Seaman v. Wood** (1856) 22 Beav. 591; **Jee v. Audley** (1887) 1 Cox. Eq. Cas. 324.

Where no part of the income is accumulated as provided for under Clause 5(1) (and this would not necessarily be known until after the expiration of "the trust period"), Clause 5(2) would empower the trustees to divide such part into ten equal parts, one part of which was to be paid to each of the nine persons named in the second class and the remaining part divided into three equal shares and paid to each of Maurice's children. The sub-clause, it must be remembered, also provided that:

> "Upon the death of any of the beneficiaries other than the Settlor and the persons in the first appointed class, the share of such deceased beneficiary shall be divided **per stirpes** among the issue of such deceased beneficiary".

Maurice died some years ago leaving children. The word issue, as Dr. Barnett has submitted, means descendants **ad infinitum,** unless the context otherwise suggests: see **Davenport v. Hanbury**

3 Ves. 259; **Hickling v. Fair** [1899] A.C. 15. In my opinion there is nothing in the context that restricts the legal meaning of the word "issue". On the contrary, the meaning contended for by Dr. Barnett is reinforced, where as here, the settlor uses the word "children" as well as the word issue in the said sub-clause. Indeed, the preamble to the Deed confirms the settlor's intention to use the term in the widest sense. Even if Mr. Henriques is correct that "issue" as used in the sub-clause is limited to "children", it is plain that the children of Maurice's children, yet unborn, would be included in the second class of beneficiaries and the gift to issue: see **Re Hipwell** [1945] 2 All. E.R. 476; **Re Embury** 109 L.T. 511. And I agree that all that a stirpital division implies is that the beneficiaries are not likely to take equally but that their shares will vary with the size of the membership of each stock in the class.

The rule is that an interest will not be treated as having vested until the person or persons entitled and their shares have been ascertained and the interest is ready to take effect in possession. Dr. Barnett is correct: the over-riding principle at common law is that everything depends on possibilities, not probabilities. So the Deed must be considered at the time it was executed. The Deed has sought to create class gifts in which if one member of the class dies, the gift to the other members will be enhanced. At common law, if a single member of the class might possibly take a vested interest outside the period, the whole gift fails, even as regards those members of the class who have already satisfied any contingency. The possibility of an increase in the members of the class as well as a decrease will have the same fatal effect. At common law there is a general rule that class gifts are not severable and the taint of remoteness corrupts the entire class: see **Re Lords Settlement** [1947] 2 All. E.R. 685; **Re Hoopers S.T.** [1948] Ch. 586.

Mr. Henriques submitted that if class gifts are created under Clause 5(2), then the Rule in **Andrews v. Partington** (1791) 3 Bro. C.C. 401 applies, according to which a numerically uncertain

class of beneficiaries normally closes when the first member becomes entitled to claim his share. And so by limiting the class, the gift, which at common law would otherwise be void for perpetuity, would be saved.

In my view, the Rule has no application in the instant case: the trustees were empowered to accumulate the income of the trust fund effectively beyond the legal perpetuity period and to provide for dispositions that might well vest outside that period. No part of the income of the trust fund might be available for distribution until after the period shall have expired.

Therefore, in my judgment not only does the limitation to issue under Clause 5(2) offend the perpetuity rule but the provisions of Clause 5(1) as to the accumulating of income are void for remoteness. This is obvious, for in Jamaica the perpetuity limit for accumulation of income is co-extensive with the period for which the vesting of property may be postponed at common law: see **Thelluson v. Woodford** (1805) 11 Ves. 112.

I accept Dr. Barnett's treatment of the question whether the gift to the named members of the second class can be severed from the limitation in favour of issue. As he points out, in construing executory trusts, the Courts apply the perpetuity rule to executory trusts but seek to mould the trust so as to carry out the testator's intention so far as the rules of law admit. But even if this approach is applied to a deed, the provisions which offend the rule, cannot be modified where, as here, it is clear that the settlor intended them to take effect: see **Re Flavel's Will Trust** [1969] 1 W.L.R. 444. The limitation to the named persons is clearly expectant and dependent on the exercise of the trustees power to accumulate the income of the trust fund under Clause 5(1) for the stipulated "perpetuity period" which, as I have said, could exceed the legal perpetuity period. I am, therefore, of the view that a common law principle applies here and it is this: a limitation which is subsequent to and dependent upon a void limitation is itself void, even though it must itself vest

(if at all) within the perpetuity period: see **Re Abbott** [1893] 1 Ch. 54 at 57; **Re Hubbard's Will Trust** [1963] Ch. 275.

So, for the aforesaid reasons, the deed of settlement offends the rule against perpetuities. The limitations accordingly fail.

In any case, are the trusts the settlement seeks to create invalid on the ground that they are incompletely constituted?

Since the settlor did not declare himself trustee of the property in question, the trusts are completely constituted only if he effectively transferred the property to the trustees and declared the trusts upon which they are to hold same, viz the shares and the land. He executed no instrument of transfer of the land which has not been described or identified in the Deed. Nor did he take any steps to transfer it to the trustees.

The deed of settlement is dated 6th October, 1993. The settlor died on 9th December, 1993. Up to December 20, 1993 the instrument of transfer of the Eaton Hall shares dated 4th October, 1993 had not been registered in accordance with Articles 26-32 of that Company's Articles of Association. The transfer of the Thermoplastics shares was presented at a meeting convened on 15th October, 1993. As the settlement is a voluntary settlement it is ineffectual if the settlor, not having declared a trust, failed effectively to transfer the shares to the intended trustees unless he did everything necessary to be done by him in order to transfer the shares.

The classic statement of the law relating to the requirement of a transfer of the property to trustees was made by Turner L.J. in **Milroy v. Lord** (1862) 4 De.G.F. 264 at pp. 274-275:

> "I take the law of this Court to be well settled, that in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfer

> the property to a trustee for the purposes of the settlement, or declare that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding, one or other of these modes must, as I apprehend the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

The gift of the Eaton Hall shares was not perfected before the settlor died on 9th December, 1993 because registration of the instrument of transfer of those shares was not effected in the name of the trustees before his death (see Article 30). The question therefore arises whether on the facts of this case he had done all that was necessary for him to do in order to transfer the said shares to the trustees.

I am unable to agree with Mr. Henriques that once the settlor executed forms of transfer of the Eaton Hall as well as the Thermoplastics shares in favour of the trustees he would have done all that was necessary to be done to perfect the transfer of his shares in both companies to them. Both companies were private companies in which the settlor had majority shareholding in what were "family" companies. He controlled the companies. He was chairman of the board of both companies and was empowered to call meetings of both boards. Under the articles of both companies transfers were approved by the board of directors and the registration effected in accordance with the resolutions of the boards. He must be taken to have been familiar with the articles of association of both companies. Take for instance, articles 28 and 30 of Thermoplastics. Article 28 includes this:

> "The instrument of transfer of any share shall be in writing and shall be signed by or on behalf of the transferor and transferee and duly attested, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the Register in respect thereof".

And Article 30 provides:

> "The Directors may in their absolute discretion and without assigning any reason therefor, decline to register any transfer of any share whether or not it is a fully paid share".

So, in the circumstances of this case the settlor was obliged, if he wished the trusts in relation to the shares to be completely constituted, to do everything in his power to see that the transfers were properly registered. This he did not do. There is no question but that the transfer of the Eaton Hall shares was not registered before he died. What was required was a properly convened meeting of each Board which he had the power and authority to arrange. In the case of Eaton Hall I am satisfied on the affidavit evidence that he did not call a meeting of the Board and that as a director and the chairman of the Board he made no adequate effort to convene a meeting so as to approve the registration of the transfer of the shares.

In the Thermoplastics case the transfer of the shares was presented at a meeting convened on 15th October, 1993. I find on the affidavit evidence that the settlor requested after several days of unexplained delay an immediate meeting of the Thermoplastics Board for the purpose of approving the transfer. It is to be observed that no explanation has been given as to the cause of the delay between 6th October, 1993 when the deed of settlement and instrument of transfer were executed and the evening of 14th October, 1993 when efforts were made to contact the directors for a meeting the next day. I accept the evidence of the secretary of Thermoplastics, Cynthia Desulme, that although meetings of the directors would be called by her on the instructions of Thomas Desulme, she received no instructions to call a meeting of the

directors for 15th October, 1993; nor was she advised that such a meeting was to be held then. Some of the directors were absent from that meeting and at least one of the absentees was present in Jamaica at the time. I am not satisfied that all the directors present in Jamaica were notified. And the notices that were given were not given within a reasonable time before the meeting.

As Dr. Barnett submitted, the reason for the need for notices is that decisions of the board of directors are to be taken by the directors collectively and each director is entitled to participate in the discussion and decision-making of the board. Each director should therefore be given reasonable notice of the board meeting so that he can exercise his own judgment as to whether he would surrender that right by his non attendance. In the result the meeting of 15th October was invalidly convened for the approval of the transfer and registration of the Thermoplastics shares. That was a consequence of the unexplained delay for the calling of the board meeting of Thermoplastics and the failure to give notice within a reasonable time. And together with the non calling of the board meeting of Eaton Hall, the settlor, who had it in his power to make appropriate arrangements for the registration of the transfers of his shares in both companies failed to do all that was necessary within his powers to vest the legal title to the shares in the trustees. In these circumstances there clearly is no equity to perfect an imperfect gift.

The same principle was applied in cases such as **Milroy v. Lord (supra)** and **Re Fry, Chase National Executors and Trustees Corp. v. Fry** [1946] 2 All. E.R. 106, [1946] Ch. 312. Jenkins J correctly, in my view, explained the principle of the decisions in those two cases in **Re Rose (deceased) Midland Bank Executor and Trustee Co. Ltd. v. Rose and Others** [1948] 2 All. E.R. 971 at p. 978A thus:

> "Those cases, as I understand them, turn on the fact that the deceased donor had not done all in his power, according to the nature of the property given, to vest the legal interest in the property in the donee. In such circumstances

> it is well settled that there is no equity to complete the imperfect gift. If any act remains to be done by the donor to complete the gift at the date of the donor's death, the court will not compel his personal representatives to do that act and the gift remains incomplete and fails. In **Milroy v. Lord** the imperfection was due to the fact that the wrong form of transfer was used for the purpose of transferring certain bank shares. The document was not the appropriate document to pass any interest in the property at all."

Re Rose (deceased) Rose and Others v. Inland Revenue Commissioners [1952] 1 All. E.R. 1217 (C.A.) and, indeed, the earlier case which also bears the name of **Re Rose**, from which the passage from the judgment of Jenkins J, just quoted, is taken, must be contrasted with the case before me and with **Re Fry (supra)**, where the donor was domiciled abroad, and had not, at the critical time, done everything that was needed of him, as he had not obtained Treasury consent to the transfer. In **Re Rose, Rose and Others v. Inland Revenue Commissioners** [1952] **(supra)** a settlor by voluntary deed executed instruments of transfer of shares in a private company in favour of trustees to be held on certain trusts. The directors, who had power to refuse to register transfers, registered the transfer some two months later. The settlor died at a time at which the shares would be treated as part of his estate for estate duty purposes if the date of the transfer were the date of registration; but would not be so treated if the date was the date of the deed. The Court of Appeal of England (comprising Evershed M.R. Jenkins and Morris L.JJ) held that the relevant date was the date of the deed because the settlor had at that time done everything possible to divest himself of the property. On the facts of that case the Court signified that all that was necessary was the formal act of registration of the third party.

Now, it is to be borne in mind that legal title to shares in a company is transferable by a written document signed by the transferor, and followed by registration in the share register in the company. Certainly, if the transaction is for consideration, the purchaser becomes equitable owner of the shares from the date

of the execution of the document of transfer. However, concerning the voluntary deed in **Re Rose** [1952] 1 All. E.R. 1217, Evershed M.R. in my respectful view went too far in declaring that after the execution of the transfer, the settlor held the shares as trustee for the beneficiaries: see [1952] 1 All. E.R. 1217 at 1222H, 1223A. In keeping with Turner L.J's judgment in **Milroy v. Lord (supra)** the transfer was either a valid transfer at law (which, in my view, it was not), or a declaration of trust; or it was ineffectual. It is difficult to see how the transfer could operate as a declaration of trust, since by attempting to transfer the shares the settlor showed an intention to divest himself of them and not to hold them as trustee. In the context of that case where the liability to tax might have been affected by the date on which the transfer of the shares was treated as being effective, the decision is, I think, defensible on the basis that that context provided a special situation.

In the other **Re Rose (supra)** Jenkins J put it succinctly as follows:

> "In this case, as I understand it, the testator had done everything in his power to divest himself of the shares in question in favour of Mr. Hook. He had executed a transfer. It is not suggested that the transfer was not in accordance with the company's regulations. He had handed the transfer together with the certificates to Mr. Hook. There is nothing else the testator could do."
>
> (Emphasis supplied)

That is not this case. Here the settlor failed to do all that was necessary within his power to vest the legal title in the shares in the trustees. There was accordingly, thanks to him, no effectual transfer of property to the trustees of the settlement prior to his death and the cardinal principle that there is no equity to perfect an imperfect gift renders the purported trusts of the voluntary settlement incompletely constituted and so void and unenforceable.

CONCLUSION

As Dr. Barnett submitted, it is plain that the settlor intended to create one general scheme of settlement and arrangement for dealing with his majority shareholding in Thermoplastics and Eaton Hall. The several parts of the Deed are interlinked in that scheme. The settlor's intention cannot be achieved by implementing one aspect and not the other. The entire settlement fails for the reasons given herein. So I hold that the Deed is invalid on each and every ground advanced by the plaintiffs.

Accordingly, the property purportedly dealt with under the settlement falls into the residuary estate of Thomas Desulme and becomes subject to the bequests in the will.

Costs of all parties as between attorneys and client are to be paid in due course of administration out of the estate of Thomas Desulme, deceased.