

### Chapter 3: Constitution of trusts and covenants to settle

- J. Garton (2003) 'The Role of the Trust Mechanism in the Rule in *Re Rose*' 67 Conv 364.

This article draws together a number of central ideas you have come across in your study of trusts law so far. It relates directly to the work you have just completed on this 'requirement' for a valid trust to be in existence; that is that the trust is constituted. The subject matter of this article also provides an important link back to earlier discussion on the conceptual nature of trusts, and within this, the operation of different types of trust instrument. Here, you will take particular note of the attention which was drawn in the book's main text to the difficulties which arise where property is not properly transferred to its intended transferee, on account of the maxim that 'equity will not infer a perfect trust from an imperfect gift'. Discussing *Milroy v Lord* (1862), and the decision in *Pennington v Waine* [2002] 1 WLR 2075, the principal focus of this article is the 'last act' rule in establishing constitution and its application. Garton proposes that there are a number of problems inherent in this rule, and identifies the trust mechanism as a point of focus for considering these difficulties. The most interesting part of the work is Garton's analysis of the role of the trust mechanism in *Rose's* operation, through considering the 'workings' of trusts which are express and constructive. You will need to consider particularly carefully the analysis offered in 'alternative approaches' to appreciate the conclusions which are ultimately offered.

- C. Rickett (2001) 'Completely Constituting an *Inter Vivos* Trust: Property Rules?', 65 Conv. 515-520.

This article's starting point is the decision in *Milroy v Lord* (1862), but it closely follows the more recent decision in *Choithram (T) International SA v Pagarani* [2001] 2 All ER 492. This case pointed to the central issues facing the courts when considering the validity of gift in which property has not become vested in the trustees, because the donor had not done all in his power to achieve this, and when the gift can only be 'saved' where it is found that the donor has constituted himself trustee. Discussion in the *Textbook* pointed to the way in which the courts will not readily infer that a person seeking to give property away (but actually failing to achieve doing so) can be taken to have actually declared himself trustee of the property. While it is easy to understand the rationale of distinguishing between attempts (albeit failed ones) to give property away, and to infer the assumption of trusteeship in absence of clear intention, Lord Browne-Wilkinson's remark that "[a]lthough equity will not aid a volunteer, it will not strive officiously to defeat a gift" is extremely revealing. It suggests that all may not be what it seems, and that the courts are not entirely consistent with their message in relation to equity's power to perfect imperfect gifts. This sets the tone for Rickett's

discussion of this case, and of the approach adopted by the court in it, and of the points of essential discussion which flow from it.