



Khan v Mahmood

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TRANSCRIPT

Hello, everyone. My name is Professor Martin Dixon. I'm going to talk to you today about a relatively recent case concerning formalities for the transfer of property, and how it connects to the creation of trusts. The case is called *Khan v Mahmood*, decided earlier this year in 2021. It connects to a very important decision that you will have already considered, the decision of *Pennington v Waine*, which was decided in 2002. That, in turn, connects to a very, very famous decision of *Milroy v Lord*.

The material that I'm about to talk about, you will find discussed in its various ways in Chapters 6 and 7 of your study guide. What are we talking about then? If we start at the beginning with *Milroy v Lord*, that is a very traditional principle in the law of equity and trusts that we say, "Equity will not perfect an imperfect gift." Now, that sounds very complicated, but what it actually means is something pretty straightforward. If I intend to give you property, absolutely to you, but for some reason, I fail, then equity will not instead declare that I hold it on trust for you. I intended to give it to you, but I fail, and so equity will not perfect it. Equity will not make it work by saying that I am to hold it on trust for you. That's a principle long-established, which finds expression in *Milroy v Lord*.

Now, why would I want to give property to you? I can think of two reasons why that might be so. First, I might want to give property to you, just as a gift to you, it's going to be yours; I'm going to give you a laptop, I'm going to give you some shares in a company, I'm going to give you some land. If I want to do that, I've obviously got to transfer the property to you in an appropriate way. The first reason I might want to give you property is it's just going to be yours.

The second reason I might want to give you property is that I'm transferring it to you to hold on trust for somebody else. Because if you can remember, in order for a trust to be valid, the trust must be constituted. When you are transferring property to somebody else, for them to be a trustee, you've got to make sure that the transfer of the property is effective.

Now, the formality rules are the same, whether I'm transferring property to you as a gift, or whether I'm transferring property to you so that you can hold it on trust. If it's land, I've got to use a registered transfer. If it's shares in a company, I have to use a share certificate. If it's personal items, I've got to deliver them. The point is, I've got to effectively transfer title to you.

If it's a gift, and I transfer title to you, that's that; it's yours. If I'm transferring title to you so that you hold it on trust for somebody there might be, not always, but there might be additional things that you need to do to create the trust, or rather that I need to do. I might need to declare the trust in writing. When I'm transferring the property to you, the same rules apply whether I'm giving it to you as a gift, or I'm giving it to you to be a trustee. I've got to get that title to you.

Now, what if I fail? What if I meant to give you this property? Let's stick with it that I'm giving it to you as a gift. What if I mean to give you this property, but I fail? Perhaps I don't execute the Share Transfer form. Perhaps I don't fill in the registered transfer. Perhaps I just make a mistake. Even though I intended to give you this property, I fail. This is where *Milroy v Lord* kicks in. *Milroy v Lord* says, "If I intended to transfer this property to you, and I fail, I cannot then be held to hold it on trust for you."

Sometimes we say, in an old-fashioned way, we say, "You cannot spell a valid trust," where I'm the trustee, "out of an invalid gift." You can't get a valid trust for you, when I'm meant to give you the property by way of an out-and-out transfer. Equity looks at my intention, I meant to give you the property, I failed, we cannot then make it work. We cannot somehow magically make it work by saying that, "Now I am a trustee." That is the fundamental principle in *Milroy v Lord*.

Now, as we all know, there are some exceptions to that. We have some exceptions where for example, we apply the rule in *Re Rose*. If I've tried to give you something, and I've taken all of the steps that I possibly could, and there is a mere technical step to take that is out of my control, then we will treat that transfer as effective, that's sometimes known as the rule in *Re Rose*.

There's another version of that known as the rule in *Re Ralli*, where property comes into your hand in an unexpected way. We've seen it also operate in the case of *Choithram v Pagarani* where the court was able to say, instead of transferring the property to you, the transferor became a trustee because of the exceptional circumstances of the case. We know there are some exceptions to this rule.

Then we come to *Pennington v Waine*, a court of appeal decision in 2002 that has attracted a great deal of criticism. If you remember *Pennington v Waine*, we had the owner of shares who wanted to transfer them to a relative, to somebody called... I think it was Harold. The transferor in *Pennington* failed to transfer the shares properly. They half completed a Share Transfer form and gave it to their agent, but the shares were never effectively transferred. The person intending to make the gift to Harold never completed that transaction. Never managed to execute the gift properly, didn't fill in the forms properly.

If you applied *Milroy v Lord* to that, clearly, Harold never gets the shares because they are never transferred properly. The transferor, I think it was Ada if I can remember rightly, the transferor could not be said to hold them on trust for Harold because you cannot create a valid trust out of a failed gift. She failed to transfer the shares to Harold. He doesn't get them, and she can't be said to hold them on trust for him. That is what a pure application of *Milroy v Lord* says.

Then the Court of Appeal does something which at the time was very unusual. Lady Justice Arden, in a judgment, which has now become quite famous, says that however, equity can step in, if it is unconscionable. Lady Justice Arden decides that it would be in the circumstances, unconscionable to prevent the transfer of the shares. She says that Ada holds the shares on trust for Harold because it would be unconscionable.

It's quite difficult on the facts of *Milroy v Lord* to know why it is unconscionable. It looks like the court of equity is being used to get round *Milroy v Lord*. There's been lots of comments about whether *Pennington v Waine* is right or not, whether it's correctly decided because it seems to be a very general principle, if it's unconscionable, impose a trust on the transferor which will effectively get round *Milroy v Lord*. It was thought that *Pennington v Waine* was unusual.

Then we have *Khan v Mahmood*. The facts of *Khan v Mahmood* don't really matter that much. It concerned land, and there was an ineffective transfer of land to the person who was intended to receive it. There was an ineffective transfer of the land because the proper procedures, the proper forms, the land registration provisions had not been complied with.

The question that arose whether Mr. Khan, the intended recipient of this land that have never been properly transferred, whether Mr. Khan could be said to own it. If you applied *Milroy v Lord* to that, the answer is no. The intended gift was invalid. It wasn't done properly. You cannot create a trust, you cannot make Mr. Mahmood a trustee because the intended transfer didn't work, and it wasn't really within the exceptions of *Re Rose*, or *Re Ralli*, or *Choithram*, it just looked like a failed transfer. The High Court, Mr. Justice Marcus Smith, he made quite a profound statement. He said that the effect of *Pennington v Waine* was actually to change the rule in *Milroy v Lord*. That the effect of *Pennington v Waine* was to develop it. The touchstone was now one of unconscionability. "*Milroy v Lord*," he says, "only invalidates a failed gift where there is no unconscionability."

Where it is unconscionable for the transferor to keep the shares, or if you like, even for the transferee not to get them, when it's unconscionable, equity will step in and place a trust on the transferor. Now, if this is accurate, if it is true, that *Milroy v Lord* has been developed, there is now a very considerable exception to the rule. Whenever it is unconscionable for the transferor to say, "But there is no transfer here because there was no formality." Whenever it is unconscionable then the court of equity will impose a trust on the transferor giving effect to the transfer. Then that trust will be a constructive trust.

When will it be unconscionable? That's a very difficult question. Later cases are going to have to tell us. For now, the key fact is that *Khan v Mahmood* in 2021 seemingly has said that *Pennington v Waine* is no longer an exception, but it's the general rule, that equity will step in to perfect a transfer by means of a constructive trust where it would be unconscionable for that transfer not to take effect.