[1999–00 Gib LR 231]

TRUSTEE OF THE PROPERTY OF PEHRSSON v. VON GREYERZ

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Hoffmann, Lord Jauncey of Tullichettle, Lord Lloyd of Berwick, Lord Hope of Craighead and Lord Clyde): June 16th, 1999

Courts—Court of Appeal—powers of court—findings of fact—may reverse lower court's findings only if plainly unsustainable—should refrain from substituting own assessment of witnesses' credibility

Equity—gifts—company shares—transfer of legal title requires execution of transfer and registration by company—equity perfects gift of shares prior to registration if transfer executed and delivered to intended recipient for registration

Bankruptcy and Insolvency—fraudulent dispositions—intention to defraud—if disposition made when financial difficulties apparent, onus on bankrupt to show unaware disposition would reduce assets available to creditors—intention at time of disposition relevant, not when decision to dispose of asset made

A trustee in bankruptcy applied to the Supreme Court for a declaration as to the beneficial ownership of a yacht and to set aside a share transfer under the Fraudulent Conveyances Act 1571.

P, a Swedish national, purchased a yacht some years before he fell into financial difficulties. K, a shipbroker, acted for him in arranging the purchase. In order to secure Gibraltar registration of the yacht for P, K's lawyers formed a Gibraltar-registered company, with nominee

shareholders, in which ownership of the yacht was vested. A certificate of registration was issued for the yacht.

Following a disagreement with K, P brought proceedings to compel the transfer to him of the two issued company shares. Under a consent order, the transfer was made into the names of nominee companies, from which the shares were later transferred into the names of the respondent (P's common law wife) and P as her nominee. The respondent was also appointed sole director, and later allotted a further 98 shares to herself. P entered voluntary bankruptcy in Sweden shortly afterwards.

The appellant trustee applied for a declaration from the Supreme Court (Pizzarello, A.J.) that P was the beneficial owner of the yacht, and that the respondent held her shares on trust for him, or that the transfer to her should be set aside. The court rejected the respondent's claims that the yacht was given to her by P immediately after its purchase, as an attempt by P—who did not appear and whose whereabouts were allegedly unknown—to defeat the trustee's claim. In dismissing K's evidence as incredible, the court took into account his evidence on peripheral matters which it disbelieved but which was subsequently shown to be correct. It held that P had given the respondent the shares when K released them, but that the transfer and subsequent allotment of shares to her would be set aside under the Fraudulent Conveyances Act 1571, since P had known at that time that he was in financial trouble.

On the respondent's appeal, the Court of Appeal reversed the decision of the Supreme Court, holding that it had wrongly rejected the respondent's uncontradicted evidence as to the gift of the yacht. It did not address the issue of the shares, on the basis that the yacht had been the company's sole asset.

On further appeal, the trustee in bankruptcy submitted that (a) the Court of Appeal should not have substituted its own view of the credibility of witnesses whom it had not seen for that of the Supreme Court; (b) P had clearly intended the beneficial ownership of the yacht to remain in the company, and the respondent's story was inconsistent with this; and (c) the Supreme Court had properly held that the transfer of the shares to the respondent was a fraudulent conveyance, since the transfer of legal ownership had occurred some months after the consent order and when P knew that he was insolvent.

The respondent submitted in reply that (a) the Court of Appeal had properly overturned the Supreme Court's findings, since the trial judge had misdirected himself as to the plausibility of certain facts which were beyond dispute; and (b) although legal title to the shares had passed when they were transferred to her from the nominee holders, the beneficial interest had passed when P formed the intention to give them to her, and for the purposes of the Fraudulent Conveyances Act, P's intentions should be examined at that point in time, when his insolvency was not yet a reality.

Held, allowing the appeal:

(1) The Court of Appeal should not have reversed the factual findings

of the Supreme Court, as they were not plainly unsustainable. It was not in a position to assess either the credibility of the witnesses who had appeared before the lower court, or the extent to which that court had relied on their demeanour or the inherent plausibility of the facts presented by them. The fact that the Supreme Court had wrongly found against them on some peripheral facts did not justify overturning its decision as a whole and, accordingly, the Court of Appeal had erred in substituting a positive finding in favour of the respondent. Although P had intended to make a gift of the yacht to the respondent by the transfer of the company shares to her, he had not done so immediately after its purchase, as she alleged. Furthermore, although P had clearly regarded himself as the beneficial owner of the company, and thus, indirectly, of the yacht, he must have intended the ownership of the yacht to lie with the company. He could not have obtained its registration in Gibraltar if the company were a mere nominee, and the litigation with K and the transfer of the shares to the respondent would have been pointless unless the shares carried with them ownership of the yacht (paras. 16–21).

(2) The Supreme Court had erred in finding that legal or beneficial ownership of the shares had passed to the respondent by gift at any point before their physical transfer to her. Legal title could pass only by the execution of a share transfer and registration in the company's books, and since P had not previously ordered the nominee holders to hold the shares on trust for the respondent, the beneficial interest in them passed to her with the legal title. Although, exceptionally, a gift of shares could be regarded as complete before registration if an executed transfer was delivered to the intended recipient, in this case the two transactions had occurred on the same day (paras. 23–28).

(3) Since the gift could not be regarded as having taken place at any time other than when the actual transfer occurred, the court had to examine P's intentions at that time for the purposes of the Fraudulent Conveyances Act 1571. The onus lay with P to show that, in the circumstances of his impending bankruptcy, the transfer was not made in the knowledge that it would reduce the assets available to his creditors. The Supreme Court had found that this burden had not been discharged, and the Judicial Committee agreed. The order setting aside the transfer would be restored (paras. 29–30).

Cases cited:

(1) *Eichholz*, *In re*, *Eichholz's Trustee* v. *Eichholz*, [1959] Ch. 708; [1959] 1 All E.R. 166, applied.
(2) *Grey* v. *Inland Rev. Commrs.*, [1960] A.C. 1; [1959] 3 All E.R. 603.
(3) *Milroy* v. *Lord* (1862), 4 De G.F. & J. 264; 45 E.R. 1185, *dicta* of Turner, L.J. applied.
(4) *Powell* v. *Streatham Manor Nursing Home*, [1935] A.C. 243; (1935), 104 L.J.K.B. 304, *dicta* of Lord Wright applied.

(5) *Reid (Owner of S.S. Alice)* v. *Aberdeen, Newcastle & Hull Steam Co. (Owners of S.S. Princess Alice)*, *The Alice and The Princess Alice* (1868), L.R. 2 P.C. 245; 5 Moo. P.C.C.N.S. 333, followed.
(6) *Rose*, *In re*, *Rose* v. *Inland Rev. Commrs.*, [1952] Ch. 499; [1952] 1 All E.R. 1217, considered.

Legislation construed:
Fraudulent Conveyances Act 1571 (13 Eliz. I, c.5), s.1:

> . . . [A]ll and every feoffement gift, grant, alienation, bargaine and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them . . . by writing or otherwise . . . at any time had or made sithens the biginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons . . . whose actions, suits, debts, account, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in any ways disturbed, hindered delayed or defrauded) to be clearly and utterly void, frustrate and of none effect. . ."

J.J. Neish, *Q.C.* for the appellant;
P.J. Hoser and *L.W.G.J. Culatto* for the respondent.

1 **LORD HOFFMANN,** delivering the judgment of the Board: Mr. Jan Pehrsson is a Swedish citizen who was adjudged bankrupt by an order of the English High Court on October 20th, 1994. The plaintiff is his trustee. Mr. Pehrsson had previously been adjudged bankrupt in Sweden on his own petition on April 3rd, 1993. The estimated deficiency for creditors in the Swedish bankruptcy was £23m. and the estimated deficiency in the English bankruptcy is £11m.

2 Before his bankruptcy Mr. Pehrsson had owned, personally or through companies, substantial properties in Sweden and the United Kingdom and lived in the style of a wealthy man. On February 3rd, 1988 he ordered a new yacht from an Italian shipyard. The price was about £350,000, which Mr. Pehrsson paid personally. Mr. Clas Kruger, a shipbroker, acted on his behalf in arranging the purchase. In order to secure registration of the vessel in Gibraltar, Mr. Pehrsson procured the formation of a Gibraltarian company called Amiane Ltd. ("Amiane"), in which its ownership could be vested. On September 6th, 1988 the yard executed a bill of sale in favour of Amiane. The British Consulate in Rome issued a provisional certificate of registration under the Merchant Shipping Act 1894, naming the ship "Midnight Fun," Gibraltar as the place of registration and Amiane as the owner. Mr. Pehrsson and Mr. Kruger took delivery. Subsequently a permanent Certificate of British Registry was issued in the same terms.

3 Amiane was formed by a firm of Gibraltar lawyers named Triay & Triay, which acted on the instructions of Mr. Kruger. The firm undertook the administration of the company through a company called T & T Management Services Ltd. ("T & T") and the first subscribers to the memorandum were two employees of T & T named Derek Galliano and Mesod Benggio.

4 Not long after the completion of the purchase, Mr. Pehrsson and Mr. Kruger fell out with each other. Mr. Kruger claimed that Mr. Pehrsson owed him £12,500 and refused to instruct Triay & Triay to transfer the shares in Amiane into his control. On November 7th, 1989, Mr. Pehrsson commenced proceedings against Mr. Kruger and T & T in the Supreme Court of Gibraltar. In his statement of claim Mr. Pehrsson said that he was the beneficial owner of the yacht, and that he had instructed Mr. Kruger to procure its registration in the name of Amiane but that, contrary to their agreement, Mr. Kruger refused to hand over the shares or the registration documents. He claimed a declaration that he was beneficial owner of the shares. He swore an affidavit verifying these claims in support of a summons for summary judgment.

5 Nothing further seems to have happened for more than two years. On June 24th, 1992 the parties agreed to a consent order under which Mr. Pehrsson paid the £12,500 to Mr. Kruger and the latter agreed to authorize T & T to transfer the shares to Mr. Pehrsson. There was some delay in completing the matter but on October 15th, 1992 the T & T nominees each transferred their shares to nominee companies controlled by Mr. Pehrsson's Gibraltar lawyers, Marrache & Co. On December 28th, 1992, on Mr. Pehrsson's instructions, one share was transferred to him and the other to Miss Madeleine von Greyerz, who was also appointed sole director. She and Mr. Pehrsson had for many years lived as man and wife and they have a child. On March 10th, 1993 Miss von Greyerz, as the board of Amiane, allotted herself another 98 shares. On April 22nd, 1993 Mr. Pehrsson presented his Swedish petition for bankruptcy.

6 The proceedings that are the subject of this appeal were commenced by the trustee in the Supreme Court of Gibraltar on April 7th, 1995. He claimed a declaration that Mr. Pehrsson had been the beneficial owner of the yacht itself and that it had accordingly vested in the trustee under the bankruptcy. He also claimed that Miss von Greyerz held the shares on trust for Mr. Pehrsson or alternatively that the transfer and allotment to her should be set aside as a fraudulent conveyance under the Fraudulent Conveyances Act 1571.

7 Miss von Greyerz's primary defence was that neither Amiane nor Mr. Pehrsson was beneficial owner of the yacht. Mr. Pehrsson had given it to her by handing her the keys, accompanied by suitable words of gift, at a party on board in Monaco immediately after the ship had been delivered,

in September 1988. In so doing, Mr. Pehrsson was fulfilling a promise he had made to give her the yacht as a birthday present and to commemorate the 10th anniversary of their association. Alternatively, he had given her the shares immediately that Mr. Kruger had released them. At that time Mr. Pehrsson was comfortably solvent and the gift was not made with any intention to defraud creditors.

8 Mr. Pehrsson, it would appear, has not been anxious to co-operate with his trustee or even to allow him to know his whereabouts. At the time of the trial in Gibraltar in September 1996, he was said to be living at an unknown address, probably in France. He did not give evidence or provide any statement. Mr. Kruger and Miss von Greyerz gave the only oral evidence relevant to the alleged gift in September 1988. In so far as they spoke of what had been said and done at the party, their account was uncontradicted and, in the nature of things, not capable of contradiction.

9 The judge, Pizzarello, A.J., nevertheless rejected their evidence. He regarded the whole story with the greatest suspicion. Mr. Kruger said that he had seen Mr. Pehrsson shortly before the trial but did not know where he lived. The judge recorded in his judgment that Miss von Greyerz had said the same, although this does not appear from his notes of evidence. He said that he found these denials incredible and that they cast doubt upon the credibility of their evidence as a whole. He seems to have suspected that Mr. Pehrsson was pulling the strings from behind the scenes, using Mr. Kruger and Miss von Greyerz to defeat the trustee's claim while he himself kept out of the way.

10 The judge also made some more detailed comments upon Mr. Kruger's evidence. He described him as having a "ready answer" to many questions but that his story revealed "shifts in emphasis." Mr. Kruger had said that when they took delivery of the vessel, the final registration certificate had not yet been issued but that they had a provisional one. The judge said that this did not "ring true." Mr. Kruger did not have the provisional certificate available at the trial but it has since been found and confirms what he said. It is not clear why the judge thought that this evidence on a highly peripheral matter was incredible. He said that Mr. Kruger shifted his ground on the question of when he had fallen out with Mr. Pehrsson. At first, to explain why the shares were not immediately transferred, he said that he suspected from the start that Mr. Pehrsson might withhold his money and then afterwards he said that it had happened later.

11 The judge also made some detailed comments on Miss von Greyerz's evidence. Her story seemed to him poorly documented. She said that photographs had been taken at the 1988 party, but did not produce any. She said that she personally had paid the yacht's expenses after it was given to her, but did not produce a single receipt. And the

judge thought that her story was weakened rather than supported by the fact that she had called Mr. Kruger as her witness.

12 Having rejected Miss von Greyerz's claim that she had been given the yacht, the judge went on to accept the claim that she had been given the shares. He held this to have happened at the time when Mr. Kruger agreed to release the shares in June 1992. But he found that Mr. Pehrsson must have known even then that he was in serious financial difficulties and had not discharged the burden of proving that the gift was not made without intent to defraud creditors within the meaning of the Act of 1571.

13 The Court of Appeal allowed Miss von Greyerz's appeal on the question of fact as to whether Mr. Pehrsson had given her the yacht in September 1988. They said that the judge was not justified in rejecting the uncontradicted evidence to this effect. Since this finding left Amiane an empty shell, they did not find it necessary to deal with Miss von Greyerz's claim to the shares. She had appealed against the finding that the gift was voidable under the Act of 1571. There was no cross-appeal against the finding that the gift had taken place in June 1992.

14 The trustee has appealed to Her Majesty in Council against the Court of Appeal's reversal of the trial judge's decision on whether there was a gift of the yacht. He has also asked leave to support the judge's decision that the gift of the shares was a fraudulent conveyance on the ground that, contrary to his finding, the gift did not take place until, at the earliest, December 28th, 1992, when the only two shares then issued were transferred into the names of Mr. Pehrsson and Miss von Greyerz. Since the question of the date of the gift was fully explored in evidence at the trial and no new evidence has emerged to throw any more light on the matter, their Lordships gave leave for the point to be argued.

15 The Court of Appeal said, correctly, that the judge had misdirected himself in regarding Mr. Kruger's evidence that he had sailed the yacht with a provisional registration as being improbable. It then examined his other reasons for disbelieving Mr. Kruger and Miss von Greyerz and said that they were not particularly strong. They considered that if the judge had been aware of the existence of a provisional registration, he might well have accepted their evidence. He did not say that he had relied upon their demeanour in rejecting it. Their evidence was not inherently improbable and therefore the Court of Appeal thought that it should have been accepted.

16 Their Lordships consider that the Court of Appeal did not take sufficient account of the difficulty faced by an appellate court in making a verdict on the basis of evidence which the trial judge had disbelieved. It may be the case that if the judge had known that one of the reasons that he gave for rejecting the evidence of a witness was wrong, he would have

been willing to accept it. On the other hand, it may have made no difference. Not having seen the witnesses, the appellate court cannot easily form a view about their general credibility. It must be remembered that in reversing the judgment of a civil court, the appellate court (unless it orders a new trial, which in this case is not a practical possibility) is substituting a positive finding in favour of the losing party. It has often been said on the highest authority that it should not take such a step unless it is satisfied that the judge's conclusion was "plainly wrong." As Wood, L.J. said in *Reid (Owner of S.S. Alice)* v. *Aberdeen, Newcastle & Hull Steam Co. (Owners of S.S. Princess Alice)* (5) (L.R. 2 P.C. at 252):

> ". . . [W]e should be most unwilling to come to a conclusion different from that of the Judge of the Court below merely upon a balance of testimony; and on its being affirmed by the Appellant that the testimony ought not to have been credited by the Judge of the Court below. He had an opportunity of testing, in the most ample manner, the conduct and demeanour of the witnesses; and we should require evidence that would be overpowering in its effect on our judgment. With reference to the incredibility of the statements made by any witness, and the general testimony to which credit has been so given, before we could venture to come to a conclusion not only in favour of an Appellant in a case of this kind, but of course a conclusion adverse to a Respondent; thus inflicting on the Respondent a loss occasioned by the Board coming to a conclusion different from that which was come to on evidence, as to the value of which we have not the same facilities and means of forming a judgment as were possessed by the learned Judge who decided in the first instance."

17 The Court of Appeal noted that the judge had not expressly said that he attached importance to the demeanour of the witnesses. But their Lordships would not expect or require judges to make specific mention of so obvious a matter. As Lord Wright said in *Powell* v. *Streatham Manor Nursing Home* (4) ([1935] A.C. at 267):

> ". . . [W]here the evidence is conflicting and the issue is one of fact depending on evidence, any judge who has had experience of trying cases with witnesses cannot fail to realize the truth of what Lord Sumner says: as the evidence proceeds through examination, cross examination and re-examination the judge is gradually imbibing almost instinctively, but in fact as a result of close attention and of long experience, an impression of the personality of the witness and of his trustworthiness and of the accuracy of his observation and memory or the reverse."

18 The difficulties of the appellate court are increased when, as in this case, there is no verbatim transcript of the evidence. The Court of Appeal

drew attention to the fact that the judge had made no note of Miss von Greyerz's evidence that she did not know where Mr. Pehrsson was living, although he recorded in his judgment that she had said this. Their Lordships think that one cannot infer that the judgment must have been mistaken. It would have been natural for the trustee to try to find out where Mr. Pehrsson was living and Miss von Greyerz's denial obviously made a strong impression on the judge.

19 Their Lordships would also observe that although, as the judge found, Mr. Pehrsson may well have intended from the start to give the yacht to Miss von Greyerz, the contention that he gave legal effect to this intention by a *traditio brevi manu* at a party on board is inconsistent with the whole of the rest of his dealings with the vessel. There is no evidence that in forming Amiane and having the bill of sale executed in its favour, he intended the company to be anything other than beneficial owner. The vessel would not have qualified for registration in Gibraltar as a British ship if Amiane had been a mere nominee. The requirement in s.1(d) of the Merchant Shipping Act 1894 that a corporate owner of a British ship must have its "principal place of business" in a British territory would be pointless if the company did not need to have any beneficial interest in the ship.

20 In this case, the presumption of a resulting trust from a purchase in the name of another does not arise because Mr. Pehrsson considered himself to be the beneficial owner of Amiane. He clearly contemplated that he would exercise control over the vessel through ownership of the issued share capital. He may well have thought that in lay terms this meant that he owned the vessel, but this does not mean that he must be treated as having an equitable interest. The litigation over the shares between Mr. Pehrsson and Mr. Kruger was fought on the assumption that the shares were of value and carried the right to the vessel. Likewise, the subsequent conduct of Mr. Pehrsson shows that the means by which he intended to give Miss von Greyerz the vessel was by vesting the shares in her name. The decision to issue a further 98 shares immediately before his bankruptcy is particularly significant in that respect. The transaction would have made no sense if Amiane was a mere trustee with no beneficial interest in the yacht itself.

21 Their Lordships therefore consider that the Court of Appeal should not have reversed the judge's finding that there had been no gift of the vessel itself. This makes it necessary to examine, as the judge did, the dealings in the shares four years later.

22 There seems no doubt that when the subscribers' shares were originally issued to the nominees of T & T, they held them on trust for Mr. Pehrsson. This is what he asserted in his action against Mr. Kruger and it is consistent with all the facts. During the time that the action was in train, he was unable to deal with the legal title and there is no evidence

that he made any attempt to dispose of the beneficial interest. The consent order provided that the shares were to be transferred to him.

23 On the day when the consent order was made, but before it had been implemented, Mr. Paul McDonnell of Marrache & Co., who had represented him in the action, sent him a fax asking for instructions. That fax is no longer available, but its general tenor may be inferred from the reply sent next day on behalf of Mr. Pehrsson by his personal assistant, Astrid van den Noort. She said she had spoken to Mr. Pehrsson and gave certain instructions on his behalf. One was: "Please transfer the shares in[to] the name of Mr. Pehrsson's wife, Miss Madeleine von Greyerz. All documents can be sent to Switzerland."

24 The judge treated this fax as demonstrating an intention to make a gift of the shares to Miss von Greyerz, and their Lordships consider that he was entitled to make this finding. As their Lordships have already said, there is no reason to reject the evidence of Miss von Greyerz and Mr. Kruger that Mr. Pehrsson had always intended to make Miss von Greyerz a gift of the yacht and to implement that intention by giving her the shares in Amiane. But the judge also held that the effect of the fax was that she was "clothed with the legal ownership of those shares." Their Lordships respectfully consider this to be wrong. There is only one way in which the legal ownership of shares in a registered Gibraltar company can be transferred and that is by the execution of a transfer followed by registration in the books of the company. Until December 28th, 1992, when the shares were actually transferred to Mr. Pehrsson and Miss von Greyerz, legal ownership remained first with the T & T nominees and then with the two Marrache & Co. nominee companies.

25 The remaining question is therefore whether Mr. Pehrsson transferred his beneficial ownership in the shares to Miss von Greyerz at any time before December 28th, 1992. There is no doubt that, as beneficial owner, he could (subject to compliance with the provisions of the Statute of Frauds which require writing for an assignment of an equitable interest) have transferred his interest by directing the trustee to hold on behalf of Miss von Greyerz: see *Grey* v. *Inland Rev. Commrs*. (2). But there is no evidence that he ever intended to transfer a beneficial interest. His intention was to make a gift by a transfer of the shares themselves. All his dealings with Marrache & Co. during the period between the consent order in June 1992 and the transfer of the shares in December are concerned only with procuring the registration of the shares in the name of Miss von Greyerz. The case therefore falls within the well-known principle stated by Turner, L.J. in *Milroy* v. *Lord* (3) (4 De G.F. & J. at 274; 45 E.R. at 1189–1190):

> "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler 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 transfers the property to a trustee for the purposes of the settlement, or declares 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 understand 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."

26 So in this case it seems to their Lordships that the gift was intended to take effect by a transfer of the shares and it is therefore impossible to construe it as having taken place by a change in the beneficial interest before the transfer had been registered. It is true that in accordance with the decision in *In re Rose* (6), a gift of shares will be regarded as completed even before registration when the donor has clothed the beneficiary with the power to obtain registration. Thus, when the donor has executed a transfer and delivered it to the beneficiary or his agent, equity regards the gift as completed. No further act on the part of the donor is needed to vest the legal title in the beneficiary and the donor has no power to prevent it. But this principle could not apply to the present case until the nominee shareholders had executed transfers to Miss von Greyerz or her nominee and delivered them into her possession or constituted themselves agents for her. Until that time, they remained nominees for Mr. Pehrsson and it was open to him to countermand the gift. Since the transfers to Miss von Greyerz and Mr. Pehrsson (treating him as Miss von Greyerz's nominee) were not executed until the same day as registration took place, the principle in *In re Rose* is of no assistance to her.

27 Mr. Hoser, who appeared for Miss von Greyerz, submitted that although equity would not perfect the gift before registration or the execution and delivery of the transfer, it did not follow that a gift which had been duly perfected by registration should be treated as having taken place only at that time. The gift should be regarded as having been made when the donor first expressed the intention of making it. He said that if

this proposition could not be regarded as universally valid, it should at any rate be applied for the purposes of deciding whether the gift was with intent to defraud creditors. Since the Act of 1571 required an examination of the donor's intentions, they should be examined at the time when he formed them and not at some later date when the mechanics of transfer were completed, possibly without any accompanying intention on his part at all.

28 Their Lordships think that the gift cannot be treated as having taken place otherwise than at the time when it was actually completed. Cases like *In re Rose* (6), which are concerned with whether the gift should be treated for tax purposes as having taken place upon registration or some earlier date, are authority against any contrary proposition. If the gift took effect from when the intention to give was manifested, it would have been unnecessary to consider when the beneficiary obtained the power to have himself registered. As for the Act of 1571, their Lordships accept that the donor's state of mind at the time when he formed the intention to make the gift may be relevant to his intentions at the time when the gift was actually made. It is, however, the latter that is actually in issue for the purposes of the Act.

29 In the present case, Mr. Hoser concedes that by October 1992 Mr. Pehrsson had defaulted on payments of interest under his loans and was aware of being in serious financial difficulties. It is not necessary for their Lordships to decide whether the judge was right in holding that he already knew this in June. Mr. Hoser also accepts that such a finding shifts to Mr. Pehrsson the onus of proving that the gift was not made with intent to defraud creditors: see *In re Eichholz* (1). The judge found that he had not discharged that burden and their Lordships consider that if the gift is taken as having been made in December 1992, this finding is impregnable. As late as November 11th, 1992, Mr. Pehrsson was giving instructions to Mr. McDonnell about the proposed share transfers to himself and Miss von Greyerz. At a time when he was in undoubted financial difficulty, he therefore knew that the transfers had not yet taken place. There is nothing to rebut the inference that he must have known that the gift would reduce the assets available for his creditors.

30 Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and the judgment of Pizzarello, A.J. restored. The respondent must pay the trustee's costs in the Court of Appeal and before their Lordships' Board.

Appeal allowed.