



**IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE
CAYMAN ISLANDS CIVIL DIVISION**

**CICA (Civil) APPEAL No. 0010 of 2023
FORMERLY CAUSE NO. GC088 of 2022**

BETWEEN

HILARY SHENIKA FREDERICK

**FIRST APPELLANT/
FIRST PLAINTIFF**

-AND-

MONICA VERONICA SMITH

**SECOND APPELLANT /
SECOND PLAINTIFF**

-AND-

CHRISTOBEL PATHRA SMITH

**RESPONDENT/
DEFENDANT**

Before:

**The Rt. Hon Sir John Goldring, President
The Hon. Sir Michael Birt, Justice of Appeal
The Rt. Hon. Sir Jack Beatson, Justice of Appeal**

Appearances:

**Mr Clayton Phuran for the Appellants / Plaintiffs
Mr Philip Ebanks for the Respondent / Defendant**

Heard:

22 April 2024

Draft circulated: 12 August 2024

Judgment delivered: 29 August 2024

JUDGMENT

Sir Michael Birt, JA

1. This is an appeal from a judgment of Walters J (Acting) (“the judge”) dated 27 April 2023 (“the Judgment”) whereby he dismissed the claim of the Plaintiffs for a declaration that a transfer of land executed on 18 December 2012 was valid and that the Land Register should be rectified accordingly. The Plaintiffs now appeal.

Factual background

2. The essential factual background was not in dispute, so much so that the evidence before the judge consisted entirely of affidavit evidence; there was no oral evidence.
3. The dispute between the parties relates to a property registered in the Cayman Islands Land Register (“the Land Register”) as West Bay Northwest, Block 4B, Parcel 322 (“the Property”). The Property was formerly owned by Olice Estermae Smith (“the Deceased”), who was the mother of the Second Appellant (to whom I shall refer as the “Second Plaintiff”) and of the Respondent (to whom I shall refer as “the Defendant”), who are sisters.
4. The First Appellant (to whom I shall refer as the “First Plaintiff”) is the daughter of the Second Plaintiff and, accordingly, the granddaughter of the Deceased and the niece of the Defendant. She resides at the Property with her 8 year old son, her younger sister Claudia and Claudia’s 1 year old daughter, the Second Plaintiff

and the Second Plaintiff's partner. I should add that the ages are those stated in the writ of summons dated 21 April 2022 and will have increased by now. The First Plaintiff states that she was born in the Property and has lived there all of her life, which was some 29 years at the date of her affidavit in November 2022. The Second Plaintiff has also apparently lived at the Property for most of her life. The Defendant has her own home where she has lived for many years.

5. The Deceased also resided at the Property until shortly before her death. On 18 June 2012, the Deceased and the First Plaintiff executed a form RL1 (being the statutory form for transfer of land) by which the Deceased purported to transfer title to the Property from her sole name into the names of herself and the First Plaintiff ("the Transfer"). It was witnessed by a Justice of the Peace and retained by the First Plaintiff. However, she did not register the Transfer in the Land Register as is required in order to transfer title. The First Plaintiff was 18 at the date of execution of the Transfer.
6. Form RL1 is a printed form which leaves spaces for various parts to be completed in manuscript. I set out below the relevant part of the Transfer as completed in this case. Those words which are in ordinary type represent the pre-prepared parts of the form and the wording in italics represents the manuscript wording inserted by the First Plaintiff and the Deceased. Having described the title to the Property, the Transfer goes on as follows:

"I Olis Esther Mae Smith

In consideration of *natural love and affection for my granddaughter*

(The receipt whereof is hereby acknowledged) HEREBY

TRANSFER

To *Olis Esther Mae Smith and Hilary Shenika Frederick*

Of *West Bay PO. General Delivery KY1-1300*

The land comprised in the above mentioned title.

The Transferees declare that they hold the combined / undivided share(s) as proprietors in common in the following undivided shares:

(or as Joint Proprietors)”

The Transfer is then signed by the Deceased as transferor and by the Deceased and the First Plaintiff as transferees, with the signatures being witnessed by the Justice of the Peace.

7. As can be seen, the parties did not, as they should have, delete one or other of the sections specifying whether the Property was to be held by the transferees as proprietors in common or as joint proprietors.
8. The Judgment records that the First Plaintiff stated in her affidavit that, initially in conjunction with the Deceased, she was responsible for the upkeep of the Property. Since the death of the Deceased, she has been the sole person responsible for its upkeep. She thought that, once her grandmother signed the Transfer, the Property belonged to both of them. After the death of the Deceased, she borrowed money by way of a loan from a bank and did renovations to the house. By the time she realised she needed to get the Transfer registered in the Land Register, the penalties for late filing would have been very high and she could not afford them.
9. The Deceased died intestate on 25 December 2015. Her estate falls to be divided equally between the Second Plaintiff and the Defendant as her two children. Letters of administration were granted to the Defendant on 6 November 2020 and she was registered in the Land Register as proprietor of the Property in her capacity as administratrix of the estate of the Deceased on 20 January 2021.
10. On 19 February 2021, the Defendant served eviction notices on the Plaintiffs, Claudia and the Second Plaintiff's partner requiring them to vacate the Property within 30 days. The Plaintiffs then instituted proceedings (GC Cause 53 of 2021)

seeking injunctions restraining the Defendant from approaching the Property or evicting or interfering with the Plaintiffs. These were granted ex parte on 19 March 2021, but were subsequently discharged on 21 February 2022 against mutual undertakings by the Plaintiffs and the Defendant which effectively preserved the status quo as to occupation of the Property pending resolution of these proceedings.

The proceedings before the Grand Court

11. The proceedings were begun by the Plaintiffs on 21 April 2022. The issues before the Grand Court were whether the Transfer was a valid transfer although it was not registered in the Land Register pursuant to the Registered Land Act (2018 Revision) (“the Act”) and/or whether the Deceased had done all she needed to do to transfer title to the Property so that a gift of the equitable title was complete.. As well as seeking a ruling on the validity of the Transfer, the Plaintiffs sought the removal of the Defendant as administratrix of the estate. However, this aspect does not appear to have been pursued at the trial as it is not mentioned in the Judgment, nor has it been raised on appeal. I shall therefore say no more about it.
12. In his original skeleton argument on behalf of the Plaintiffs before the Grand Court, Mr Phuran referred to the well-known dictum of Turner LJ in *Milroy v Lord* (1862) 4 De G. F & J 264 at 274 where he said:

“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 these 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.”

13. Mr Phuran accepted (at the second para 7 of his original skeleton) that equity will not perfect an imperfect gift and, for the gift to be valid, the donor must have done everything that according to the nature of the gift, was necessary to have been done by him in order to transfer the property. He submitted that in this case the Deceased had done all that was necessary to be done by her. She had signed the Transfer and handed it to the First Plaintiff who could thereafter register it in the Land Register at any time.
14. Mr Ebanks, on behalf of the Defendant, in his original skeleton before the Grand Court, referred to the Canadian case of *MacLeod v Montgomery Estate* [1979] A.J. No. 857 and submitted that, in order for everything to be done which was necessary, the Transfer had to be registered in the Land Register as required by the Act. In the absence of registration, there was an incomplete gift which the court could not perfect.
15. In *MacLeod*, the transferor executed a transfer of land by way of gift in favour of her granddaughter (subject to reservation of a life interest) and handed the transfer document to the granddaughter. The position in relation to title to land in Alberta appears to have been not dissimilar to the position under the Act in that the

transfer document needed to be registered in order to transfer title. Thus section 56 of the Land Transfer Act, RSA, 1970 provided (so far as relevant):

“56. After a certificate of title has been granted for any land, no instrument is effectual to pass any estate or interest in that land...unless the instrument is executed in accordance with the provisions of this Act and is duly registered thereunder....”

16. Although she had promised to do so, the transferor in *MacLeod* did not hand the duplicate title to the granddaughter and it was retained by the transferor’s solicitor. The granddaughter was unable to register the transfer in the absence of the duplicate title.
17. The judge at first instance ordered that the duplicate title be delivered to the granddaughter or, failing delivery, that the registrar register the transfer without the duplicate. On appeal to the Alberta Court of Appeal, the issue, as set out at [9] by Morrow JA, giving the judgment of the court, was whether execution of the transfer with its delivery to the granddaughter, but without delivery of the duplicate title, constituted a complete or an incomplete gift.
18. The Court of Appeal held that the gift was not complete as registration could not occur in the absence of the duplicate title, which was retained by the transferor’s solicitors. The reasoning is conveniently summarised at [31] of the judgment in the following terms:

“31. ..To complete a gift effectively, the donor is obliged to do what can be done. In Alberta, in order for a transfer to be registered, that transfer has to be accompanied by a Duplicate Certificate of Title, unless the Title is already lodged at the Land Titles Office; or, alternatively, unless there is proof that the Duplicate Certificate of Title has been lost or destroyed. In my opinion, the delivery of the transfer, as well as the

Duplicate Certificate of Title, was required to complete the gift in this case. The Duplicate Certificate of Title was not delivered. It lay in the would-be donor's power, by instructions to her solicitors, to complete the gift. There is no evidence that she gave such instructions. Equity will not force a volunteer to complete that which is incomplete. Had the Duplicate Certificate of Title been lodged at the Land Titles Office,... the delivery of the transfer would have completed the gift, as the donor would have done everything that could be done to perfect the gift. That is not so in the case at Bar. The gift was not completed."

19. It is clear from this paragraph that, had the transferor arranged for the duplicate title to be handed over to the granddaughter so that, armed with the transfer and the duplicate title, the granddaughter would have been able to register the transfer without reference to the transferor, the court would have upheld the gift on the basis that the transferor would have done all that she had to do to perfect the gift. The decision would therefore seem to be consistent with the principle of *Milroy v Lord* as elaborated by subsequent decisions (as to which see paras 43 to 59 below).
20. Reverting to the proceedings in the Grand Court, it appears that reference was made at the hearing before the judge to the Land Registry Procedure Manual ("the Manual") and the judge requested further submissions after the hearing on two points, namely:

"(i) The Land Registry Procedure Manual indicate (sic) that a transfer document in the form required under the act known as a RLI should be submitted in duplicate. What is the effect if the RLI was not done in duplicate at the time of transfer?"

(ii) The RL1 did not select whether the donor and the donee should hold the property as joint tenant or tenants in common. What is the effect of this on the transfer?”

21. Mr Phuran duly filed supplementary written submissions on these two points on 10 March 2023. In relation to the second point (which is the only material one) he referred to the case of *Morley v Bird* 3 Ves. Jun 629, (1798) 30 ER 1192 which established the principle under English law that where land was conveyed to two or more persons, they were to be treated as joint tenants in the absence of any wording indicating that they were to be tenants in common. He submitted that, as there was no such wording in the Transfer, the Deceased and the First Plaintiff should be regarded as joint proprietors notwithstanding the absence of any choice in the Transfer itself.
22. It was at this point that matters took an inappropriate turn. Rather than simply produce submissions on the two points raised by the judge, Mr Ebanks, without copying in Mr Phuran, emailed the Registrar of Lands on 9 March 2023 posing six questions. The Registrar replied to Mr Ebanks on 15 March giving her answers.
23. So far as relevant, the questions posed by Mr Ebanks and the Registrar’s answers were as follows:

“Q2. In which cases of transfer does the Registrar require a statutory declaration for consideration with the transfer form? Is there a written policy? If so, can you please provide.

A. The Registrar usually request (sic) a Statutory declaration to be submitted upon the submission of a Transfer for Natural Love and Affection. This requirement was implemented at the request of the Minister of Finance who has responsibility for the collection of stamp duty. The

Minister of Finance is responsible to certify the qualification for Natural Love and Affection. If the statutory declaration is not produced applicants can approach the Ministry for the waiver of duties.

Q3. In cases where there is no contract accompanying the transfer forms produced for registration does the Registrar require any further form of sworn confirmatory documentation? If so please indicate what form that would take. If there is written policy in relation to same, please send a copy of same.

A. Applicants are required to produce to (sic) a Declaration on Conveyance of Preceding Agreement requested by the Valuation and Estates Office. I will ask the Valuation & Estate Office if there is a written policy on same and to respond to this specific query.

Q4. In cases of the RL transfer form being produced for registration, for a transfer from registered proprietor to themselves and a third party [family member] on the basis of “natural love and affection”, but without, designating on the form how the property is to be held following transfer [i.e. is it to be held by them as joint proprietors or as proprietors in common as to particular designated shares], would the Registrar process it without further reference to the transferor? If not, what further actions would the Registrar require before a registration could be processed?

(a) Under section 99 of the RLA “Every instrument made in favour of two or more persons, and the registration giving effect to it, shall show – (a) whether such persons are joint proprietors or proprietors in common; and where they are proprietors in common, the share of each proprietor”. Consequently, if the designation is not shown on the transfer form we would return the instrument for compliance with the Act.”

[original emphasis]

24. On 22 March 2023, Mr Ebanks filed supplementary submissions together with the email from the Registrar and other material. He sent it to Mr Phuran the same day who, by email to the court dated 23 March, objected that Mr Ebanks had gone beyond making submissions on the two points requested by the judge, but said that he did not intend to make any further submissions.
25. In his supplementary submissions, Mr Ebanks largely repeated the content of his original submissions. However, he also referred to the response from the Registrar and the content of the Manual, both of which indicated that, if an attempt had been made to register the Transfer, it would have been returned by the Registrar because of the failure to specify whether the transferees were to take as joint proprietors or proprietors in common. He also referred to three Cayman cases referred to below, which, he submitted, clearly indicated that the courts had accepted that the Act and its associated policies, procedures and directions comprised a self-contained mandatory code. In effect he maintained his submission that in the absence of registration of the Transfer, there was an incomplete gift which could not be perfected. Because of the way in which Mr Ebanks had contacted the Registrar after the hearing and Mr Phuran's decision not to make any further submissions following notification of the Registrar's answers, the judge did not have any submissions on behalf of the Plaintiffs in response to the statements made by the Registrar.
26. In the Judgment, the judge referred to the answers from the Registrar which Mr Phuran had obtained and appears to have accepted them as evidence. In particular, he noted that, in accordance with the Registrar's answers, in the event of an attempt to register the Transfer, further action would have been required in three respects before registration could occur. These were:
- (i) production of a statutory declaration (which would appear from [39] of the Judgment to be a document which a transferor must sign)

confirming the Deceased's relationship to the First Plaintiff (for the purposes of paying minimum stamp duty);

- (ii) a Declaration on Conveyance of Preceding Agreement (which appears from [40] of the Judgment to be a document which a purchaser must sign) declaring that the Transfer was executed without prior written agreement between the vendor and the purchaser; and
- (iii) completion of the Transfer by indicating whether the Deceased and the First Plaintiff were taking the Property as joint proprietors or proprietors in common, see [41] – [42] of the Judgment.

27. At [48] of the Judgment, noting that these three further steps would be required before registration could occur, the judge stated that he was following the approach in *Milroy v Lord* and *MacLeod* and held that the Transfer was not a completed gift and the court did not have jurisdiction to complete the gift. He therefore dismissed the application for a declaration that the Transfer was valid and also the application for rectification of the Land Register.

28. The judge did not specifically address the argument in Mr Phuran's supplementary submissions to the effect that, following English jurisprudence, joint proprietorship was to be presumed in the absence of any specific wording suggesting proprietorship in common. Nor did he address the Defendant's argument that, in the absence of registration, there could be no complete gift. The sole ground for the judge's decision was that the Deceased had not done all that she could do to transfer the Property (as required by *Milroy v Lord* and *MacLeod*) because of the three additional matters which still required to be done. The clear inference from the Judgment is that, if these matters had not required attention before registration could take place, the judge would have granted the relief sought.

The grounds of appeal

29. The skeleton argument on behalf of the Plaintiffs does not set matters out in exactly this way but, as I understand it, Mr Phuran is essentially raising four arguments for saying that the judge's decision was wrong:

- (i) The judge was wrong to find that the Deceased had not done all in her power to transfer the Property.
- (ii) The Defendant, as representative of the estate of the Deceased, was estopped from denying the validity of the Transfer.
- (iii) The Transfer was effective to transfer the beneficial interest in the Property.
- (iv) The Transfer should be construed as a declaration of trust by the Deceased whereby she held the Property on trust for herself and the First Plaintiff as joint tenants in equity.

30. I shall consider these grounds in turn, but must first set out the relevant statutory provisions and the existing case law on the correct approach to the statute.

The Registered Land Act

31. The Act was originally enacted in 1971. The version before us is the 2018 Revision but we were informed that there have been no changes in any of the relevant provisions since 2012 (being the year of the Transfer). Section 3 of the Act provides:

“Except as otherwise provided in this Act, no other law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act...”

32. The Act established a system of title to land by registration. So far as relevant, section 23 provides:

“Subject to section 27, the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever but subject:

(a) to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register:

Provided that:

(i) nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee; and

(ii)”

33. Dispositions of land are dealt with in section 37(1) which is in the following terms:

“37(1) No land...registered under this Act shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of such land...otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land...

(2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorised...”

There then follows a proviso dealing with part performance or persons already in possession but these are not relevant for present purposes and were not relied on in argument before us.

34. Transfers of land are dealt with by section 83 which, so far as relevant, provides:

“83(1) A proprietor, by an instrument in the prescribed form, may transfer his land...to any person with or without consideration.

(2) The transfer shall be completed by registration of the transferee as proprietor of the land...and by filing the instrument.

(3)”

Cases on the approach to the Act

35. We were referred to three Cayman cases which have considered the approach to the Act. In *Paradise Manor Limited (In Liquidation) v Bank of Nova Scotia*, 1984-85 CILR 437, one of the issues before the Court of Appeal was whether the bank could exercise a power of sale conferred upon it (in the event of default) in a debenture which was not in the prescribed form and had not been registered. This court held that the bank had no such power because, under section 37 of the Act, no right of a proprietor in or over his land registered under the Act was capable of being affected except in accordance with the Act; and since the debenture was not in the prescribed form and was not registered under the Act, it could not by itself and independently of the Act confer any power affecting the rights of a proprietor of registered land. Any purported exercise of the power of sale conferred by the debenture would therefore be ineffectual to transfer any right or interest in the land.

36. In passing, Henry JA, having referred to section 37(1) (set out at para 33 above) said at 480:

“By applying the definition of ‘disposition’ to s.37, the meaning that emerges is that no right of a proprietor in or over his land, lease or charge registered under the [Act] shall be capable of being affected [except] in accordance with the [Act] and the system of registration established by it....Any attempt to affect the right of the proprietor otherwise than in accordance with the [Act] is ineffectual for that purpose.”

37. In *Mums Incorporated v Cayman Capital Trust Company* [2000] CILR 131, the issue before the Court of Appeal was whether the court could order the interest of a joint proprietor of property to be sold in order to enforce a judgment obtained against that joint proprietor. It was argued by the appellant that joint proprietorship under the Act was analogous to the estate of joint tenancy which existed in England prior to 1925 under which each joint tenant had absolute power to dispose of his interest during his life.

38. Delivering the judgment of the court, Georges JA, having referred to section 3 of the Act said at 134:

“It would appear from these provisions that the [Act] is intended to cover completely the matters pertaining to the registration of land and dealings in registered land with which it purports to deal. While concepts of English land law both before and after 1925 may provide a useful backdrop against which to view the [Act], they should not be permitted to intrude upon its interpretation.”

39. The court then considered the terms of section 100 of the Act, which provided that where land was owned jointly, any disposition could only be made by all the joint proprietors, unlike under English law where a joint tenant could sever a joint

tenancy unilaterally. It held that, in the light of section 100, any sale of a joint proprietor's share without the consent of the other joint proprietor would be inconsistent with the Act and therefore ineffectual. It followed that the court had no power to order a sale without the consent of the other joint proprietor. In passing, the court specifically endorsed (at 134) the dictum of Henry JA in *Paradise Manor* referred to above.

40. Finally, in *H Limited v B & F Limited* [1994-5] CILR 343, Smellie J, as he then was, had to consider, amongst other issues, whether an option to buy property in the event of default in a loan constituted an equitable mortgage. Smellie J drew on the observations in *Paradise Manor* and *Mums Inc.* and held that there could not be a disposition of land by way of mortgage, whether legal or equitable, as that form of disposition was not provided for in the Act itself.
41. Although it was not cited in argument before us, I would also refer to [19] of the judgment in *Cayman Islands Shores Development Ltd v Registrar of Lands* (7 March 2023, CICA Appeal 17 of 2021) where this court (Goldring P, Field and Beatson JJA) referred to the Act as '*a formalised comprehensive code*' as well as to the importance both of certainty of title in respect of land and the integrity of the land registration system.
42. I draw from these cases the conclusion that the courts of this jurisdiction have, as one would expect, held that, where it deals with a matter, the Act occupies the field and principles of English property law cannot have any application to the extent that they are inconsistent with the Act. The courts have taken section 37(1) of the Act to mean what it says, namely that any attempt to dispose of land otherwise in accordance with the Act will be ineffectual to transfer or create any estate, right or interest in the land. The requirements of the Act in relation to transfers are as set out in section 83, namely that there must be an instrument in the prescribed form which must then be filed in the Land Register, with the transferee then being registered as proprietor.

43. Against that background, I turn to consider the four arguments put forward by the Plaintiffs on appeal.

(i) The deceased had done all in her power

44. Mr Phuran referred to the passage from *Milroy v Lord* quoted above and submitted that the judge had erred in finding that the Deceased had not done all she reasonably could to complete the gift to herself and the First Plaintiff. He submitted that the law had moved on since 1862 and now adopted a more benevolent approach to gifts which had not been fully completed. In this connection, he referred to three cases which were not before the judge.

45. In *Re Rose Deceased* [1948] 2 All ER 971 (“*Rose I*”), the deceased had executed an appropriate form of share transfer for preference shares in a company in favour of the donee, Mr Hook, and had handed the completed transfer and the relevant share certificate to the donee. However, the shares were in a private company and the right to transfer was subject to the consent of the directors, who refused to register the transfer during the deceased’s lifetime. In his will, the deceased bequeathed the preference shares to Mr Hook “*if such preference shares have not been transferred to him previous to my death*”. Subsequent to the deceased’s death, the directors registered the transfer.

46. The issue before Jenkins J in the Chancery Division was whether the shares had been transferred to the donee during the deceased’s lifetime within the meaning of the will. It can be seen that the issue was not identical to that which arises in many of the cases, namely whether the court will perfect a gift after the death of a deceased, but the observation of Jenkins J on the principle of *Milroy v Lord* is regarded as a classic statement of the relevant principle. At 978, Jenkins J said as follows:

“It is argued on behalf of the residuary legatee that the testator’s transfer of the 5,000 preference shares to Mr Hook was at the time of the

testator's death in the state of being an incomplete or inchoate gift, owing to the fact that the transfer was not registered in the testator's lifetime. I was referred to Milroy v Lord and also to Re Fry, Chase National Executors and Trustees Corp v Fry. Those cases, as I understand them, turned on the fact that the deceased donor had not done all in his power, according 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 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. In Re Fry the flaw in the transaction, which was a transfer or transfers of shares in a certain company, was failure to obtain the consent of the Treasury which, in the circumstances surrounding the transfers in question, was necessary under the Defence (Finance) Regulations, 1939, and it was held that the donor's executors ought not to execute confirmatory transfers. That is, of course, exactly in accordance with the principle that equity will not compel an imperfect gift to be completed. Something had to be done by the donor's executors if the gift was to be completed, and that was the execution of further transfers which were not open to the objection of the absence of Treasury consent.

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 that transfer together with the certificates to Mr Hook. There was nothing else the testator could do...." [Emphasis added]

- Jenkins J accordingly held that the shares had been transferred to Mr Hook previously to the testator's death within the meaning of the relevant clause of the will.
47. The second case also concerned a Mr Rose, albeit a different one. In *Re Rose, Rose v Inland Revenue Commissioners* [1952] 1 Ch 499 (“*Rose 2*”), the English Court of Appeal was concerned with whether two gifts of shares by the deceased had been completed by 30 March 1943. If they had, no estate duty would be payable whereas if they had not been completed until a later date (such as the stamping of the share transfer form or registration in the books of the company), estate duty would be payable.
 48. The facts were that the deceased had executed share transfers in favour of transferees in the form required by the company's articles of association and handed them, together with the relevant share certificates, to the transferees. They were subsequently registered but this was not until a later date. If the date of registration was the effective date of transfer, estate duty would be payable.
 49. The Court of Appeal (Evershed MR, Jenkins and Morris LJJ) specifically approved (at 512) the statement by Jenkins J in *Rose 1* quoted at para 46 above. The court also accepted (at 510) the general proposition in *Milroy v Lord* that if a donor, purporting to transfer property, executes documents which are not apt to effect that purpose, the court cannot then extract from those documents some quite different transaction and say that they were intended merely to operate as a declaration of trust, which *ex facie* they were not.
 50. However the court held that, as the deceased in this case had done everything in his power to transfer the shares by executing the correct form of share transfer and handing it together with the share certificates to the transferees on 30 March 1943, the transferees from that moment became the beneficial owners of the shares and the deceased had held the shares on trust for the transferees from that point until legal title was also transferred upon registration of the transfers. However, it was

key to this finding that the deceased had done everything in his power to transfer his legal and beneficial interest by executing the transfers and handing those transfers and the share certificates to the transferees; see Evershed MR at 506 and Jenkins LJ at 515.

51. Mr Phuran placed particular reliance on the third case of *Pennington v Waine* [2002] EWCA Civ 227. This was another case involving the transfer of shares in a company. The facts were that on 30 September 1998, Mr Pennington, a partner in the relevant company's auditors, held a meeting with the deceased when she said that she wanted to transfer immediately 400 of her shares to her nephew, Harold. Mr Pennington gave instructions to a member of his staff to prepare a share transfer form for the 400 shares which the deceased signed and returned to Mr Pennington. He in turn gave it to a member of his staff who placed it on the company's file and took no further action prior to the deceased's death in November 1998. However, the deceased indicated to Harold that she wanted to give him some of her shares and on 15 October 1998 Mr Pennington wrote to Harold about his becoming a director and also stating that the deceased had instructed him (Mr Pennington) to arrange the transfer to Harold of 400 shares in the company. He added that this required no action on Harold's part. No further action was taken in relation to the transfer of the shares before the deceased's death. The share certificates for the deceased's shares were already held by the company. The deceased's will made specific gifts of the balance of her shares but made no specific mention of the remaining 400 shares which, it was contended, supported the inference that she thought she had already transferred them to Harold.

52. The issue before the Chancery Division was whether the 400 shares formed part of the deceased's residual estate or were held on trust for Harold absolutely. The judge held that Mr Pennington was not the company's agent when he received the form of transfer signed by the deceased but nevertheless held that the gift of the shares became effective when the deceased executed the share transfer form on

- the basis that she had transferred the whole beneficial interest in the 400 shares to Harold thereby rendering herself and subsequently her executors bare trustees of the legal interest.
53. The Court of Appeal upheld this decision. However their reasons differed. Arden LJ, with whom Schiemann LJ agreed, conducted a detailed review of the cases. Having referred to the principle that equity will not assist a volunteer, as established in cases such as *Milroy v Lord*, she said at [34] that since then, equity had “*tempered the wind to the shorn lamb (i.e. the donee)*” in three respects.
 54. First, as established in both *Re Rose* decisions, it was not necessary for the donor to have done all that was necessary to complete the gift, short of registration of the transfer. It was sufficient if the donor had done all that it was necessary for him or her to do (see [56] of her judgment). Equity had softened the position as stated in *Milroy v Lord* to that extent.
 55. Secondly, equity had intervened to temper the situation by utilising the constructive trust. Thus, as was held in *Rose 2*, the court had held that the beneficial interest in the shares had passed when the share transfer and share certificate was delivered to the relevant donee and thereafter the donor held as trustee for the donee (see [59] of her judgment).
 56. Thirdly, equity had tempered the situation by applying a benevolent construction to words of gift. Thus the principle that, where a gift was imperfectly constituted, the court would not hold it to operate as a declaration of trust, did not prevent the court from construing it to be a trust if that interpretation was permissible as a matter of construction, which might be a benevolent construction. In that respect Arden LJ referred to the case of *T. Choithram International Essay v Pagarina* [2001] 1 WLR 1, to which I refer below (see [60] and [61] of her judgment).
 57. Having accepted that in *Rose 2*, delivery of the share transfer to the donees had been an essential part of the court’s decision, Arden LJ nevertheless held that it did not follow that delivery could not in some circumstances be dispensed with.

- On the particular facts of this case, as explained at [66], she thought this was such a case. Alternatively, she considered that the words used by Mr Pennington to Harold that “*this requires no action on your part*” should be construed as meaning that the deceased and, through her, Mr Pennington became agents for Harold for the purpose of submitting the share transfer to the company, from which it followed that the deceased had done all she could do.
58. Clarke LJ adopted a more radical approach, from which Mr Phuran sought to draw support in relation to his argument referred to at (iii) below. Clarke LJ held that the mere execution of a proper form of share transfer was sufficient to amount to an equitable assignment of the donor’s interest in the shares, i.e. a transfer of the beneficial interest in those shares; and this without the need for any further action on the part of the donor such as delivery of the share transfer to the donee so that the donor had done all that he could do to enable the donee to complete his title. However, his judgment did not find support from his two colleagues and considers only the position in relation to a transfer of shares. Given that it is a minority judgment and that it was not considering transfers of land under a system whereby registration of title is an essential element, I do not think that it assists Mr Phuran.
59. Although, on the specific facts of that case, the court in *Pennington* was able to uphold the validity of the gift of shares, I do not read it as departing from the well established principle established in both *Rose* cases to the effect that the deceased needs to have done everything in his or her power to divest himself of the asset in question if the court is to uphold the gift, and it is notable that Arden LJ’s alternative ground of decision was consistent with that principle.
60. A useful summary of the principle in its modern form, quoted with apparent approval by Arden LJ at [30] of her judgment, is to be found in the judgment of Browne-Wilkinson LJ in the English Court of Appeal in the case of *Mascall v Mascall* (1984) P & CR 119 where he said:

“The basic principle underlying all the cases is that equity will not come to the aid of a volunteer. Therefore, if a donee needs to get an order from a court of equity in order to complete its title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee needs no assistance from equity and the gift is complete. It is on that principle, which is laid down in Re Rose, that in equity it is held that a gift is complete as soon as the settlor or donor has done everything that the donor has to do, that is to say, as soon as the donee has within his control all those things necessary to enable him, the donee, to complete his title.”

In my view, this is also an accurate statement of the position under Cayman law.

61. That principle was certainly the basis on which the case was decided by the judge in the present proceedings and accordingly I revert to Mr Phuran’s submission that the Deceased in this case had done all that was in her power to effect the gift; in particular, his submission that the fact that the Transfer did not specify whether the Deceased and the First Plaintiff were to hold the Property as joint proprietors or proprietors in common did not matter. This was because of the principle of English law, which he submitted was equally applicable in this jurisdiction, that, where land was conveyed to two or more persons, they were to be treated as joint tenants in the absence of any wording indicating that they were to be tenants in common; see *Morley v Bird* referred to at para 21 above. As there were no such words in this case (because the relevant choice had been left blank), the principle should apply and the Transfer was to be regarded as transferring the Property to the Deceased and the First Plaintiff as joint proprietors. There was accordingly no need for any further step to be taken prior to registration.

62. I cannot accept this argument because of the terms of the Act. Section 99(1) provides as follows:

“99(1) Every instrument made in favour of two or more persons, and the registration giving effect to it, shall show:

(a) whether such persons are joint proprietors or proprietors in common; and

(b) where they are proprietors in common, the share of each proprietor.”

63. It is clear therefore that the Act requires any instrument, such as the Transfer, to show whether the transferees are to be joint proprietors or proprietors in common and it also requires the registration in the Land Register to show this.

64. In my view, this statutory provision is wholly inconsistent with the existence of a common law principle derived from English law that, in the absence of a document of transfer stating whether the transferees are to hold as joint proprietors or proprietors in common, they are to be registered as joint proprietors. It is therefore not surprising that, as stated by the judge, the Manual at 3.2.1 provides that a failure to state whether prospective co-owners will hold jointly or in common is regarded as a “minor compliance problem” which requires the application to be returned for completion. That is consistent with the answer of the Registrar to question 4 from Mr Ebanks where, having pointed out that section 99 of the Act required instruments of transfer to state whether transferees are to be joint proprietors or proprietors in common, she said that, if the designation was not shown on the transfer form, the instrument would be returned for compliance with the Act. Where the statute itself requires the form of transfer to specify whether property is to be owned jointly or in common and also requires the Land Register to record this, it seems to me inevitable that, where, as in this case, the form of transfer does not contain that information, it will not be registered until it does comply with the Act. To hold otherwise, as

- submitted by Mr Phuran, would be to act contrary to the guidance of Georges JA (quoted at para 38 above) and to allow a principle of English land law to override the clear requirements of the Act.
65. Mr Phuran made the further point that it is for the transferees rather than the transferor to determine how they will hold property and that accordingly no further action was required by the Deceased as transferor. However, the transferees in this case included the Deceased and, as a person, she needed to complete the form (together with the First Plaintiff) in order to indicate whether she and the First Plaintiff were to hold as joint proprietors or proprietors in common and if the latter what the relevant proportions were.
 66. In the circumstances, the judge was in my view correct to find that the Deceased had not done all that she needed to do to enable the Transfer to be registered so as to fall within the principle established in *Milroy v Lord* as elaborated by the decisions in *Rose 1* and *Rose 2*.
 67. That finding is sufficient to reject this ground of appeal and it is therefore not strictly necessary to consider the second and third aspects where the judge found that the Deceased had not done all that she needed to do, namely the production of a statutory declaration confirming her relationship to the First Plaintiff and a Declaration of Preceding Agreement.
 68. If it had been necessary, I would have had difficulty in upholding the judge's conclusion on these two aspects, particularly given the unsatisfactory way in which the evidence about them emerged following the hearing and after the Plaintiffs' supplementary submissions. Mr Ebanks' questions had been put to the Registrar without notice to Mr Phuran so that the judge did not have the benefit of any submissions on behalf of the Plaintiffs in respect of those questions. He also did not have the benefit of submissions about the Registrar's answers to those questions in view of Mr Phuran's decision not to make any further submissions after being notified of those answers.

69. In relation to the statutory declaration point, it is true that, in her email quoted at para 23 above, the Registrar stated in answer to question 2 that she would “usually request” a statutory declaration where the transfer is for “natural love and affection”, although she went on to say that if a statutory declaration was not produced, applicants could approach the Ministry of Finance for waiver of the relevant duty.
70. However, the Registrar’s answer does not appear to be entirely consistent with the Manual. Thus at 5.3.4.4, the Manual states:

“5.3.4.4

Natural Love and Affection – Fixed Stamp Duty

If the consideration is expressed to be for ‘Natural Love and Affection’ in order to secure the fixed stamp duty of \$50 under the statutory exemption, then there must be proof of the relevant relationship, such as office copies or certified copies of the relevant birth certificates or marriage certificate.”

As can be seen, that does not make any reference to a statutory declaration. There is such a reference at 5.3.1.4 of the Manual where, in the context of a two-step transfer for Natural Love and Affection, it is stated:

“Often the relevant birth certificates or marriage certificates showing the relationship will be satisfactory evidence, or a statutory declaration if they are not available.”

But it is noteworthy that, even in this passage, the Manual suggests that a statutory declaration would only be necessary if evidence such as a birth certificate is not available.

71. Given the unsatisfactory manner in which the Registrar's answers came to be adduced, the lack of any submissions from the Plaintiffs and the apparent inconsistency of the answer to question 2 with what is said in the Manual, it is not clear to me that there was a proper evidential foundation for the judge to find that a statutory declaration executed by the Deceased would be needed before registration could occur. If production of birth certificates of the Second Plaintiff and the First Plaintiff would be sufficient to show the relationship of grandmother and granddaughter between the Deceased and the First Plaintiff, it is not clear to me that anything further needed to be done by the Deceased as the First Plaintiff could have produced these documents when applying to register the Transfer.
72. As to the suggested need for a Declaration on Conveyance of Preceding Agreement because there was no prior contract, we were not referred to – and I have not been able myself to find – any provision in the Manual which specifies this as a requirement. Furthermore, the suggested form of Declaration set out at [40] of the Judgment, is clearly aimed at a situation where there is a sale of the land because it refers to “the Vendor” and “the Purchaser” in the Declaration. In these circumstances and again given the unsatisfactory manner in which the Registrar's answers were adduced, it is not clear to me that the judge was right to find that such a Declaration would also be required for a gift between a grandmother and a granddaughter, where one would not expect there to be a contract accompanying the form of transfer.
73. However, as stated above, it is not necessary finally to determine whether the judge was correct to find that these two additional aspects were also matters where the Deceased had not done all that she needed to do in respect of the transfer of title to the Property and accordingly I say no more about them.

(ii) Estoppel

74. Estoppel was not raised as an argument before the judge and was only referred to in very delphic terms at para 16(i) of the grounds of appeal filed on 10 July 2023. It was only raised specifically for the first time in Mr Phuran’s skeleton argument filed shortly before the hearing of this appeal.
75. In the circumstances, Mr Ebanks submitted that the Plaintiffs should not be permitted to raise estoppel as it was too late and he had not dealt with it in his skeleton argument.
76. In *Primeo Fund v Bank of Bermuda (Cayman) Limited* [2023] UKPC 40, the Privy Council at [145]-[155] emphasised the importance of the principle of finality in litigation and considered the application of this principle in the context of an appellant seeking to raise new points on appeal. Having considered a number of cases on the subject, the Privy Council summarised the position at [155] in the following terms:

“155. In summary, because of the principle of finality in litigation and the policy reasons which support that principle, an appellate court proceeds with great caution before it allows a new point to be taken on appeal. The appellate court may depart from the principle of finality....where the point is a pure point of law and the proceedings below would not have been conducted differently if the point had been taken at first instance.... But the principle of finality is likely to be upheld if new evidence is needed for its determination or if the opposing party is otherwise prejudiced. The cases which the Board has discussed above provide useful guidance as to the circumstances in which the principle of finality will be upheld.”

77. In my opinion, this court should not give leave for the estoppel point to be taken for the first time before this court. If it had been contended on behalf of the Plaintiffs below that the Deceased and/or her estate were estopped from denying

the validity of the gift of the Property, it seems inevitable that counsel representing the Defendant would have wished to cross-examine the First Plaintiff on her alleged reliance on the Transfer, given the apparent conflict between what she said in her affidavit as to her understanding of the effect of the Transfer (see para 8 above) and what was said on her behalf in the Plaintiffs' original skeleton argument before the Grand Court, to the effect that she was advised by the Justice of the Peace at the time of execution of the Transfer of the need for registration of the Transfer by attending at the Registry the following week to lodge the Transfer. The Defendant would therefore be prejudiced if the point were now taken on appeal.

78. However, in case I am wrong in thinking that leave should be refused, I will deal briefly with the argument because in my judgment it cannot succeed.
79. Mr Phuran bases his argument on estoppel on two cases. The first is *TCB Limited v Grey* [1956] 1 All ER 587, a decision of Sir Nicolas Browne-Wilkinson V-C in the Chancery Division of the High Court of England and Wales. In that case, the defendant executed a power of attorney in favour of his solicitor to act on his behalf in executing certain documents. The solicitor then executed a guarantee on behalf of the defendant using the power of attorney. By law, a power of attorney had to be signed and sealed but the power of attorney appointing the solicitor was not sealed. Following default, the bank made demand under the guarantee and subsequently instituted proceedings against the defendant under his guarantee. Amongst other defences, the defendant argued that the guarantee was invalid because the power of attorney under which it was signed was invalid as it had not been executed under seal.
80. Browne-Wilkinson V-C accepted that, if it was open to the defendant to argue the point, he would have found that the power of attorney had not in fact been sealed. However, he found that the defendant was estopped from raising the point for the following reasons as set out at 595A:

“But is it open to the defendant to raise the point? In my judgment the answer is No since he is estopped from denying that the document was sealed. The defendant has executed a document drafted as a deed which says that he has thereunto set his hand and seal. The document states in terms that it was signed, sealed and delivered in the presence of Mr McGuinness. There is therefore a representation of the fact that it was in fact sealed. The defendant executed the document with the intention that it should be relied on as a power of attorney and knowing that TCB were going to rely on it as such. TCB in fact relied on it to their detriment, since they advanced money in reliance on documents executed under the power. The case therefore has all the necessary elements of a classic estoppel.”

81. The second case relied on by Mr Phuran is *Headley v Headley* [1999] 3 JJC 2611, a decision of the Court of Appeal of Jamaica. In that case, the issue before the judge at first instance was whether a deed of gift of some land executed by the deceased was valid or whether it was invalid, so that the land passed under the deceased’s will. The law required a deed of gift to be executed under seal. Although the deed of gift asserted on its face that it was under seal, the judge found that it was not in fact executed under seal and was therefore invalid.
82. The Court of Appeal applied the reasoning in *TCB* and held that the deceased would have been estopped from raising the point that the deed was not sealed and consequently would have been obliged to adhere to the content of the deed. The Court of Appeal went on to hold that the respondent, who claimed under the deceased’s estate, could be in no better position than the deceased herself and accordingly that the respondent was also estopped from relying upon the fact that the deed had not been sealed.
83. Mr Phuran submits that, applying the principle of the above two cases, the Deceased would have been estopped from denying the validity of the Transfer and accordingly the Defendant is similarly estopped. However, the facts of the above

cases were completely different from the present case. What was said in those cases was that the relevant document contained a representation of fact (namely that it had been executed under seal) and that this representation was given by the person executing the relevant document (the defendant in the case of the power of attorney in *TCB* and the deceased in the case of the deed of gift in *Headley*), when in fact the document had not been executed under seal with the consequence that there was a misrepresentation of fact. The cases simply held that the person executing the document (or his estate) was therefore estopped from resiling from the representation of fact which had been made by the document.

84. In the present case, there has been no representation of fact by the Deceased in relation to the Transfer. She executed the Transfer exactly as it states on the face of the document. All that was required in order for the Transfer to have legal effect was that it be registered in the Land Register. What is contended now on behalf of the Defendant is simply that, as registration has not taken place and the Deceased had not done all she could to put the First Plaintiff in a position to register the Transfer, the Transfer does not have effect. There is no misrepresentation or conduct on the part of the Deceased which could conceivably give rise to an estoppel.

(iii) Transfer of the beneficial interest in the Property

85. Both before the judge and this court, Mr Phuran submitted that execution of the Transfer passed the beneficial interest in the Property to the Deceased and the First Plaintiff jointly. In support of this submission he relied upon the dictum of Lord Wright, speaking for the Privy Council, in *Abigail v Lapin* [1934] All ER Rep 720 as well as the decision in *Rose 2* referred to above. *Abigail* was a case in New South Wales where the system for the registration of title to land appears to have been not dissimilar to the position in this jurisdiction pursuant to the Act. The facts of *Abigail* were however very different from the present case. Simplifying them somewhat for present purposes, the original registered

proprietors executed the statutory form of transfer in favour of a Mrs Heavener. The court at first instance found that this was in fact a transfer by way of security for certain monies which the original proprietors owed but that the transfer and the subsequent registration at the land registry showed Mrs Heavener as the absolute owner with no reference to the transfer being by way of security. Mrs Heavener was subsequently lent money by Mr Abigail (“the ultimate mortgagee”) but this mortgage was not registered in the land registry. The dispute which came before the courts of New South Wales and ultimately the Privy Council was between the original proprietors and the ultimate mortgagee, neither of whom could show any registered title.

86. The Privy Council upheld the decision of the courts below to the effect that this was a competition between two equities, namely that of the original proprietors to regain the property once their debt was paid and that of the ultimate mortgagee, who had lent money to the apparent owner Mrs Heavener and had the benefit of an unregistered mortgage. The Privy Council held that, in the circumstances, the greater equity lay with the ultimate mortgagee because the original proprietors had, by their action, armed Mrs Heavener with the power to go into the world as the absolute owner of the land and thus execute a mortgage in favour of a third party on the basis of possessing a larger estate than was in fact the case. Their equity ought therefore to be postponed to the equitable rights of the ultimate mortgagee.

87. In the course of his judgment, Lord Wright said at 725:

“The Real Property Act 1900 of New South Wales, embodies what has been called, after the name of its originator, the Torrens system of the registration of title to land. It is a system which is enforced throughout Australasia and in other parts as well. It is a system for the registration of title, not of deeds; the statutory form of transfer gives a title in equity until registration, but when registered it has the effect of a deed and is effective

to pass the legal title; upon the registration of a transfer, the estate or interest of the transferor as set forth in such instrument, with all rights, powers and privileges thereto belonging or appertaining, is to pass to the transferee. No notice of trust may be entered in the register book, but it has long been held that equitable claims in interests in land are recognised under the Real Property Acts....” [Emphasis added]

88. Given the specific facts with which the Privy Council were concerned, it is by no means clear that, when speaking of a “*a title in equity*” the Privy Council was necessarily referring to a beneficial interest in the land, as submitted by Mr Phuron. If that is what the Privy Council was saying, then it appears to be not entirely consistent with an observation of the Privy Council in the earlier case of *McEllister v Biggs* (1882-83) LR 8 App. Cas 314 where it is stated that:

“It was contended on behalf of the Appellants that the deeds under which the Plaintiffs derive title from Guthrie, not having been registered in pursuance of section 39 of the Act to which allusion has already been made, passed no interest in the lands. That section enacts that “no instrument shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any instrument in manner herein-before prescribed the estate or interest specified in such instrument shall pass”. Their Lordships are of opinion that, although the deeds did not pass an interest in the land, still they passed to the Plaintiffs the equitable right which Guthrie had to set aside the certificate of title to McEllister upon the ground of fraud....”

89. However, assuming for present purposes that due execution of a statutory form of transfer is, as Mr Phuran submits, effective to pass the beneficial interest in land to the transferee pending registration, (as to which see the reservation mentioned at paras 101 to 104 below), this does not assist the Plaintiffs in the present case.

That is because, as *Rose 2* makes clear (albeit in the context of a transfer of shares rather than of land) the equitable title passes upon the transferor having done all in his power to transfer his interest. Thus, in *Rose 2* it was an essential part of the reasoning that the deceased had duly completed a proper form of share transfer in accordance with the procedure prescribed by the company's articles (see Evershed MR at 506 and Jenkins LJ at 515). In my opinion, it is also clearly implicit in Lord Wright's dictum that the statutory form of transfer which he refers to has been duly and properly completed.

90. As discussed above, that is not the case here. The Transfer was not properly completed in accordance with the requirements of the Act and was incomplete in that it was left unstated as to whether the transferees were taking as joint proprietors or proprietors in common. It is not therefore open to Mr Phuran to argue that, pending registration of the Transfer, the Deceased held the Property as trustee for herself and the First Plaintiff as equitable joint owners rather than proprietors in common because the Transfer did not specify which of these was applicable. To revert to the language in *Rose 2*, the Deceased had not done everything in her power to transfer her legal and beneficial interest in the Property to herself and the First Plaintiff and accordingly the beneficial interest in the Property had not passed.
91. It follows that I reject Mr Phuran's submission that, on the facts of this case, the beneficial interest in the Property passed to the Deceased and the First Plaintiff jointly on execution of the Transfer.

(iv) Was there a declaration of trust?

92. Closely related to the previous point, Mr Phuran further submitted that, as elaborated by Arden LJ in *Pennington v Waine* (as set out at para 56 above), the courts nowadays adopt a more benevolent approach to the words of a gift than was the case at the time of *Milroy v Lord*. In support of this assertion, Arden LJ

referred in her judgment to the decision of the Privy Council in *T Choithram SA v Pagarani* (supra at para 56). Mr Phuran similarly drew support from the decision in that case, where the judgment on behalf of the Board was delivered by Lord Browne-Wilkinson.

93. The facts of that case were that the donor established a philanthropic foundation by trust deed shortly before his death and appointed himself as one of the trustees. He then stated orally that he gave all his wealth to the foundation, expressly including shares in and deposit balances with four companies. The transfer of the deposit balances had not been completed prior to his death and the shares had not been transferred, although the companies registered the trustees of the foundation as the shareholders and issued new share certificates after his death. The plaintiffs, who were entitled to the donor's estate on intestacy, brought an action in the British Virgin Islands claiming that the donor had not made a valid gift of the deposit balances and shares. The judge and the Court of Appeal of the British Virgin Islands upheld that claim.
94. The Privy Council, however, allowed an appeal. At 11, Lord Browne-Wilkinson said:-

“The judge and the Court of Appeal understandably took the view that a perfect 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.... 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....”

95. Having referred to the fact that the courts below had said that the donor used words of gift to the foundation rather than words declaring himself a trustee and that therefore the gift failed. Lord Browne-Wilkinson went on to say:

*“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 [the donor] 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* if the words of [the donor’s] gift (i.e. 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 trust of the foundation trust deed”. Although the words are apparently words of outright gift they are essentially words of gift on trust.” [Emphasis added]*

96. Lord Browne-Wilkinson then went on to hold that, as the donor was one of the trustees and the trust property was vested in him, the gift was complete even though the property had not yet been vested in his co-trustees because, 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.

97. Mr Phuran submitted that the position in this case was analogous to that in *Choithram*. That was because, under English law, the Law of Property Act 1925 provides that, where there is co-ownership of real property, the co-owners of the legal estate can only hold it as joint tenants. Furthermore the Trusts of Land and Appointment of Trustees Act 1996 provides that since 1 January 1997 property acquired or held by co-owners is held on a trust of land. Co-owners of the beneficial interest may hold this either as joint tenants or tenants in common. On this basis, he submitted that, following execution of the Transfer, the Deceased was thereafter one of two trustees (namely her and the First Plaintiff) and that as the Property was vested in one of the trustees (namely her), the gift should be treated as being complete in accordance with the decision in *Choithram*.
98. The difficulty with this argument is that, assuming Mr Phuran is correct in his assertion as to the position under English law, as to which we heard no argument, neither of the English Acts referred to have any application in Cayman and there is nothing in the Act to suggest that co-owners hold property as trustees. On the contrary, sections 99 to 101 of the Act are inconsistent with the notion that co-owners must hold the legal estate as joint tenants with the beneficial interests being held as joint tenants or tenants in common. Thus, as stated earlier, section 99 requires the Land Register to show whether co-owners are joint proprietors or proprietors in common (thereby negating the idea that co-owners must hold the legal estate as joint owners and cannot hold it by way of ownership in common) and sections 100 and 101 provide (so far as relevant) as follows:

“Characteristics of joint proprietorship and severance thereof

100.

(1) Where the land... is owned jointly, no proprietor is entitled to any separate share in the land, and consequently –

(a) dispositions may be made only by all the joint proprietors;

and

(b) on the death of a joint proprietor his interest shall vest in the surviving proprietor or the surviving proprietors jointly.

(2)

(3) Joint proprietors, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joint proprietorship, and the severance shall be completed by registration of the joint proprietors as proprietors in common in equal shares and by filing the instrument.

Characteristics of proprietorship in common

101.

(1) Where any land... is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.

(2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.”

99. It is clear therefore that, under the Act, legal and beneficial title may be held both by way of joint proprietorship and proprietorship in common and no question of a trust necessarily arises, although of course joint proprietors may hold as trustees. In the circumstances, whilst I fully accept the statement that, although equity will not aid a volunteer, it will not strive officiously to defeat a gift, the English principles relied upon by Mr Phuran as showing that a trust has arisen have no application and there is nothing else relied upon to suggest that the Deceased intended to create a trust with her and the First Plaintiff as co-trustees. Accordingly, the decision in *Choithram* does not assist the Plaintiffs in this case.

Unresolved point

100. As stated at paras 14 and 25 above, Mr Ebanks submitted before the Grand Court that, in the absence of registration of the Transfer, there was an incomplete gift which could not be perfected. In other words, even if a donor has done everything that he or she could do to perfect the gift (e.g. by handing a properly completed statutory form of transfer to the donee with any other necessary documents so that the donee could thereafter register the transfer without further reference to the donor) the gift will not be complete in the absence of registration and the court cannot perfect the gift. He referred in particular to section 37(1) of the Act (quoted at para 33 above) which meant what it said when it provided that any attempt to dispose of land otherwise in accordance with the Act was ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in land. This would include any equitable interest in the land.
101. The judge did not deal with this submission in the Judgment. His decision was based entirely on the assumption that, if a donor had done everything he needed to do, the court would grant relief but that, on the facts, this had not happened in this case.
102. Before us, Mr Ebanks sought to renew the above submission. However, he had not filed a Respondent's Notice seeking to support the judge's decision on additional grounds to those contained in the Judgment and accordingly the point had not been addressed by the Plaintiffs in their written submissions. In the circumstances, the court refused leave to Mr Ebanks to pursue the point.
103. It follows that the point is unresolved and may be pursued on a future occasion. The court expresses no view on the merits of the argument one way or the other. The decision in this case is based entirely on the assumption that, if a donor has done all in his power to divest himself of the land, and the only missing element is registration in the Land Register by the donee, the gift may be regarded as complete and the court may grant any necessary relief.

Conclusion

104. Whilst I have considerable sympathy for the First Plaintiff as it would seem that the Deceased clearly intended to give an interest in the Property to her and the gift could have been perfected at any time before the Deceased's death, I have with reluctance concluded that the judge reached the right conclusion and that accordingly this appeal must be dismissed.

Beatson JA:

105. I agree.

Goldring P:

106. I also agree.