No Longer Waning - *Pennington* Revived?

Nosnehpetsj Ltd v Watersheds Capital Partners Ltd [2020] EWHC 1938 (Ch D) Case Note

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Cases cited
Nosnehpetsj Ltd v Watersheds Capital Partners Ltd [2020] EWHC 1938 (Ch D)
Pennington v Waine [2002] EWCA Civ 227; [2002] 1 WLR 2075 (CA)
Re Rose, Rose v IRC [1952] Ch 499; [1952] 1 All ER 1217 (CA)
JSC VTB Bank v Skurikhin [2019] EWHC 1407 (Comm)
Collins v Simonsen [2019] EWHC 2214 (QB)
UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch D)

Introduction

At times, the law is far from crystalline. This is particularly evident within the law of trusts, where it can seem that, for as many rules and principles as there are in this area of law, there are just as many qualifications to them. Matters are made worse when courts utter the mystifying term 'unconscionability' – as if a judicial shibboleth – and treat such as sufficient to trigger the recognition of a constructive trust.

One of the most well-known examples utilising the 'unconscionability' justification is that of *Pennington v Waine*[1]. Eighteen years have passed since the decision and many were perhaps of the view that the case was consigned to the past. However, the recent High Court case of *Nosnehpetsj Ltd v Watersheds Capital Partners*[2] appears to have dusted off the doctrine and breathed life into that which was thought dead and gone. This note will consider the judgment in *Nosnehpetsj* and will argue *Pennington* should never have been invoked, and that the presumption made by the judge in the case risks further undermining the formalities requirements.

[1]Pennington v Waine [2002] EWCA Civ 227; [2002] 1 WLR 2075.
[2]Nosnehpetsj Ltd v Watersheds Capital Partners Ltd [2020] EWHC 1938 (Ch).

Facts and decision

Nosnehpetsj concerned that of a Mr Richard Buzzoni, a chartered accountant and former corporate finance specialist, who owned two companies: Nosnehpetsj Ltd ("JStephenson" written backwards[3]) and Watersheds Capital Partners Ltd (WCP). It was understood that Mr Buzzoni held shares in both of these companies and, in 2010, transferred his ordinary shares in WCP to JStephenson Ltd; this understanding was consistent with JStephenson Ltd's abbreviated accounts filed at Companies House for the year ending March 2011, which showed WCP's ordinary shares were owned by JStephenson Ltd from March 2010. Mr Buzzoni had approved the accounts before they were filed.

In 2013, JStephenson Ltd transferred the WCP shares back to Mr Buzzoni personally, and for no consideration. Then, near the beginning of 2014, following an application made just over 12 months earlier, JStephenson Ltd was subsequently struck off the company register and dissolved. However, later in 2014, following a successful application from a former JStephenson Ltd employee, the company was restored to the register for the purposes of an Employment Tribunal. In addition to the restoration request, the former employee requested for JStephenson Ltd to be placed into liquidation, a request which was granted in 2015. The company was then placed into liquidation later that year and a liquidator appointed – Mr Elliot Green.

Mr Green applied to the court to reverse the transfer of shares (which occurred in 2013) from JStephenson Ltd to Mr Buzzoni, as JStephenson Ltd was in fact insolvent at the time of the transfer. Despite the accounts detailing the initial transfer from himself to JStephenson Ltd in 2010 (accounts which Mr Buzzoni had himself approved), Mr Buzzoni claimed that he had in fact never transferred the WCP shares to JStephenson Ltd, arguing there was never a gift of the shares to the company and that, having not completed the necessary formalities, there was not an effective transfer of the shares (in neither law nor equity).

The case was heard by Chief Insolvency and Companies Judge (Nicholas) Briggs who concluded that it was more likely than not Mr Buzzoni did intend an absolute gift of the shares to the company, having inferred such from the surrounding evidence of the case. More importantly, Judge Briggs held that, despite there being no completed share transfer form present (or evidence alluding to such), a completed form had likely existed and that there was an equitable assignment of the shares. The effect of this meant that, despite the lack of documentary evidence,

[3]Hereafter, 'JStephenson Ltd'.

the intention to transfer the shares was enough; it would have been unconscionable for Mr Buzzoni to deny the transfer of the shares, as the information regarding such a transfer was communicated to, and relied upon by, a third party (Her Majesty's Revenue and Customs).

Comment

When an owner of property, acting of their own volition, seeks to transfer their property they may be required to adhere to specific formalities. For instance, though an owner may orally declare a trust of their land, statute requires for the declaration to be manifested and proved by signed writing.[4] Similarly, if the owner of shares seeks to transfer such as a gift, there are specific legal formalities for doing so.[5] But of course, these statutory requirements are not, technically speaking, a *sine qua non*; there are occasions where, despite the legal formalities having not been satisfied, the eyes of equity will look upon it as effective. As Arden LJ memorably stated, "equity [has] tempered the wind to the shorn lamb…[and done so] on more than one occasion and in more than one way."[6] *Pennington v Waine* was one such instance.

As well-known as *Pennington v Waine* is, however, there is not a clear consensus regarding the principle's roots. Some are of the opinion that it was merely an extension – the equitable overgrowth – of the rule in *Re Rose*.[7] Others have taken secateurs to sever and (trans)plant *Pennington* in a wholly separate pot, treating it as a distinct doctrine.[8] Whatever the reader's view of the decision, the passage of time coupled with the judicial disinclination to invoke the principle[9] implied that *Pennington* was to be left alone, to wither away.

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[4] s53(1)(b) Law of Property Act 1925.

[5] s1 Stock Transfer Act 1963.

[6] Pennington v Waine [2002] EWCA Civ 227; [2002] 1 WLR 2075 at [54] per Arden LJ. Echoing Lord Browne-Wilkinson in T Choithram International SA v Pagarani [2001] 1 WLR 1 at [11]: equity will not "strive officiously to defeat a gift".

[7] Re Rose, Rose v IRC [1952] Ch 499; [1952] 1 All ER 1217 (CA). See e.g. G Virgo, The Principles of Equity Trusts, 4th edn, (Oxford University Press 2020) p 142; JE Penner, The Law of Trusts, 11th edn (Oxford University Press 2019) p 217.

[8] eg. S Sutherland, 'Defying easy explanations – the case of Pennington v Waine 18 years on' (2020) 26(5) Trusts Trustees 404, 405; C Webb and T Akkouh, Trusts Law, 5th edn (Palgrave, 2017) p 135; M Halliwell, 'Perfecting imperfect gifts and trusts: have we reached the end of the Chancellor's foot?' (2003) Conv 192, 195.

[9] See eg. Zeital v Kaye [2010] EWCA Civ 159; Curtis v Pulbrook [2011] EWHC 167 (Ch); [2011] 1 BCLC 638.

In 2019, three separate High Court cases revisited *Pennington*. Each of the three cases made reference to *Pennington*[10] – yet they were far from ringing endorsements of the doctrine. Indeed, within *UTB LLC v Sheffield United Ltd*[11], *Pennington* was only mentioned briefly in passing; the judge having given short shrift to the claimant's argument of its relevance to the case.[12] Likewise, in both *Collins v Simonsen*[13] and *JSC VTB Bank v Skurikhin*[14], although *Pennington* was discussed in more depth, both judges dismissed the application of such, again distinguishing on the facts. It is therefore clear that, notwithstanding the allusions made within each of these recent decisions, they cannot be interpreted as the courts tilling the equitable soil in preparation for a *Pennington* revival. If anything, the cases only serve to echo the prevailing conversative mood of the courts towards the Pennington principle; the judiciary likely only to give credence to such (if at all) provided it is, as Clarke LJ would say, "on all fours with the instant case".[15] As will be discussed, *Nosnehpetsj* is not a case which can be said to be on all fours with it, making Judge Briggs' decision all the more surprising. Yet, before analysing that judgment, it is first necessary to briefly revisit *Pennington v Waine*.

Pennington v Waine

Pennington v Waine concerned a Mrs Ada Crampton who had sought to transfer 400 of her shares in Crampton Bros Ltd absolutely to her nephew, Harold Crampton Jr. However, Mrs Crampton failed to effectuate an *inter vivos* transfer in accordance with the legal formalities; the completed transfer form was inadvertently retained (through the fault of the company auditor Mr Pennington), and thus never received by the company before her death. Therefore, the company could not register her nephew as the new legal owner of the 400 shares. Nevertheless, the Court of Appeal unanimously agreed to treat that which may have otherwise been considered an imperfect gift of shares, as effective in equity.

Within his judgment, Clarke LJ chose to focus on the issue of whether there was an effective equitable assignment of the shares. Mrs Crampton had demonstrated a clear intention to transfer the shares outright to her nephew and had also

[10]Each one heard within different divisions of the High Court: JSC VTB Bank v Skurikhin [2019] EWHC 1407 (Comm); Collins v Simonsen [2019] EWHC 2214 (QB); UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch). UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch).

[11]UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch).

[12]Ibid, at [252] per Fancourt J.

[13]Collins v Simonsen [2019] EWHC 2214 (QB).

[14]JSC VTB Bank v Skurikhin [2019] EWHC 1407 (Comm).

[15]Pennington v Waine [2002] EWCA Civ 227; [2002] 1 WLR 2075 at [86] per Clarke LJ.

completed the necessary share transfer form (as required by statute); in his Lordship's view, the existence of a completed transfer form alone was that which was required for an equitable assignment of shares.[16]

Likewise, implicit within Arden LJ's judgment (with whom Schiemann LJ agreed) was that the presence of a completed share transfer form was necessary for there to be an equitable assignment of shares.[17] Though admittedly the existence of the completed transfer form was not the sole determining factor influencing the outcome, it was still a significant one. Within her judgment, Arden LJ explained that central to the decision was unconscionability – to prevent resiling from the gift – but added that there can be "no comprehensive list of factors which makes it unconscionable for the donor to change his or her mind: it must depend on the court's evaluation of all the relevant considerations."[18] Her Ladyship then went on to state that which she deemed the key relevant factors in the case, including that of the presence of the completed share transfer form.[19] In other words, presence of that form (necessary for an equitable assignment) played an important role in the Court's decision; it is highly unlikely the Court would have ruled as it did absent a completed share transfer form.[20]

Nosnehpetsj: *Pennington* revived?

Evidently, *Nosnehpetsj* was not a case which stood on all fours with *Pennington*; it was, at best, bipedal. Though it involved a transfer of shares, and by way of gift, it was not in a familial setting nor did it concern giving effect to the deceased transferor's wishes; it concerned an insolvency, with the transferor still alive, and those who were to ultimately benefit from the invocation of *Pennington* not being the intended donee/recipient, but rather third-party creditors on whose behalf the liquidator was acting. Such differences aside, more important was how *Pennington* was considered.

Within the judgment, Judge Briggs listed the factors which he considered to have supported unconscionability in *Pennington*. Rather surprisingly though, he did not to refer to the Court of Appeal decision but the remarks of the puisne judge in the High Court decision instead. Consequently, his Justice iterated three factors which

[16]Delivery of such was not needed (Ibid, at [81-83] and [87] per Clarke LJ).
[17]Ibid, at [66] per Arden LJ.
[18]Ibid, at [64] per Arden LJ.
[19]Ibid.
[20]The same for which could be said of Re Rose, Rose v IRC [1952] Ch 499; [1952] 1 All ER 1217 (CA).

he considered supported unconscionability in *Pennington*, viz. that there was an intention to make an immediate gift; the donee had been informed of the gift; and that it would have been unconscionable to recall the gift.[21] Careful consideration of these factors, however, reveals their problems. The first and second elements, taken together, are equivalent to impromptu benevolent comments potentially being enforced – and far from being a saving grace, the third element is a *petitio principii*; it begs the question.

A close examination of the judgment also reveals that Judge Briggs neglected to mention the subsequent, specific factors which her Ladyship deemed significant in *Pennington* – the very factors which influenced the Court of Appeal in their finding that it would have been unconscionable to resile. One such factor being the presence of the completed share transfer form.[22] Though it is perhaps unfair to say that, this particular omission, shows his Justice's reluctance to attribute sufficient weight/significance to the need for a completed share transfer form to be present, the omission should not be ignored. This is because, in not discussing the importance of such a form having to being present, it meant his decision to presume there was a completed form (on the balance of probabilities[23]) was but a small step to take. Yet, even this seemingly small step can have unforeseen consequences.

Rule in *Re Rose*

Judge Briggs said it was likely that Mr Buzzoni and Mr Stephenson had produced a stock transfer form, that it would have been completed by the defendant, Mr Buzzoni, and the form subsequently countersigned by the company.[24] The judge then stated:

> "…it is more likely than not the stock transfer [form], although not registered, was left on the Company file and was one of the documents shredded. Alternatively, it was uploaded electronically and held on the Company server which either no longer exists or has not been disclosed".[25]

[21]Nosnehpetsj Ltd v Watersheds Capital Partners Ltd [2020] EWHC 1938 (Ch) at [41].
[22]Ibid, at [40].
[23]Ibid, at [92].
[24]Ibid.
[25]Ibid.

That is, any discussion of *Pennington v Waine* should be considered superfluous as such a presumption places *Nosnehpetsj* on a similar footing to *Re Rose*[26]; the donor being deemed to have executed and delivered the share transfer form to the donee company, but the transfer of shares not being registered by the company. This seemingly slight step taken by his Justice – finding that there was likely a completed transfer form and it was received by the company – consequently meant the rule in *Re Rose* should have been the applicable rule, not that of *Pennington*; the transferor had done all within his power to give effect to the transfer of the shares.[27]

Nevertheless, as alluring as the *Re Rose* point is, we should be careful not to ignore the fact the judge's presumption is doing a fair amount of work here. Though it may seem somewhat innocuous, his presuming there existed a share transfer form (which was completed and then received by the company), meant that the only other issue was to establish an intention to transfer the shares – an intention which he was able to infer without too much difficulty from the surrounding evidence.[28] This meant Judge Briggs was able to overlook the need for actual evidence of a completed share transfer form (despite such being important in both *Pennington* and *Re Rose*) and to take a fairly broad sword to the problem. As a result, *Nosnehpetsj* does little for supporting the formalities requirements – something which Arden LJ explicitly warned about[29] – and nor does it do much to provide clarity in an already disordered area of the law. It now seems possible for there to be an equitable assignment of shares despite there being no evidence of a completed share transfer form. Looked at critically, *Nosnehpetsj* appears to be close to a decision where the court had strived officiously to *uphold* a gift.

[26]Re Rose, Rose v IRC [1952] Ch 499; [1952] 1 All ER 1217 (CA).

[27]That the transferor subsequently contests the transfer will not necessarily preclude the rule from applying (see eg. Mascall v Mascall (1984) 50 P CR 119).

[28]Nosnehpetsj Ltd v Watersheds Capital Partners Ltd [2020] EWHC 1938 (Ch) at [90]. Thus, removing the need to consider a possible presumed resulting trust.

[29]"Nothing in this judgment is intended to detract from the requirement that a donor should comply with any formalities required by the law to be complied with by him or her, such as, in the case of a gift of shares, the completion of an instrument of transfer" (Pennington v Waine [2002] EWCA Civ 227; [2002] 1 WLR 2075 at [69] per Arden LJ).

Fraud

There is a simpler solution, one which does not require presuming the existence of a completed share transfer form. CICC Judge Briggs explained that:

> "A running theme through the liquidation and this litigation is Mr Buzzoni's failure to produce books and records of [JStephenson Ltd] of the type and scale expected by Mr Green. Mr Buzzoni's account of the whereabouts and existence of records has altered over time."[30]
> Speaking in relation to email evidence from October 2012 concerning a request from Mr Buzzoni to Mr Stephenson, his Justice did not mince his words: "[Mr Buzzoni] was asking Mr Stephenson to manipulate the accounts."[31]

Additionally, he declared that "it [was] more likely than not that Mr Buzzoni was attempting to 'tidy up' past dealings"[32] and claimed that Mr Buzzoni "either caused or allowed the transfer form to be shredded or lost".[33] The clear insinuation being that he did not consider Mr Buzzoni a trustworthy man, but a dishonest one.

Judge Briggs' depiction of Mr Buzzoni leads to the possibility of an alternative, and more straightforward, line of reasoning which could have been pursued. Mr Buzzoni contested that there was never any assignment of the shares consequent of there being no completed transfer form in existence. Of course, the purpose of this counterargument by the defendant was likely to prevent the liquidator depriving him of the shares (Mr Green seeking to obtain them on behalf of the company's creditors). But, looked at from another angle, this was simply Mr Buzzoni seeking to use statute as an instrument for fraud. By relying on (his apparent lack of adherence to) the formalities of the Stock Transfer Act 1963, so as to deny an effective transfer of the shares and thus retain ownership, he had committed fraud.[34] Consequently, he would be holding the shares on constructive trust for the liquidator, and ultimately the creditors; it would have been unconscionable for Mr Buzzoni to rely on the statutory formalities in an effort to defraud the company's creditors and personally benefit from retention of the shares.

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[30] Nosnehpetsj Ltd v Watersheds Capital Partners Ltd [2020] EWHC 1938 (Ch) at [6].
[31] Ibid, at [32].
[32] Ibid, at [64].
[33] Ibid, at [93].
[34] The intention to transfer the shares again being inferred from the surrounding evidence.

Conclusion

Many years have passed since the judgment in *Pennington* was handed down. While it would be wrong to say that recent decisions were calling for abolition of the doctrine, they nevertheless reflected the contemporary courts' reluctance to invoke it.[35] *Nosnehpetsj* is, therefore, a decision which appears to be at odds with the general tenor of the judiciary. Crucially, however, it was a case which did not in fact require invocation of the doctrine. Moreover, the same outcome could have been achieved through more straightforward means – the prevention of fraud – with such an approach more deferential to statute and not risking the possibility of undermining the formalities requirements. Therefore, though the overall outcome can be viewed as an incidence of well-meaning husbandry by the High Court, and is surely correct, it would be remiss to consider it another instance wherein equity tempered the wind. And it would be wise to acknowledge the key role the presumption played in the case – and to be cautious should courts do likewise in future. For it would only take one further (mis)step for it to be tantamount to providing the lamb with a shelter, but one built solely from the branches of the infamous palm tree.

[35] Zeital v Kaye [2010] EWCA Civ 159; Curtis v Pulbrook [2011] EWHC 167 (Ch); [2011] 1 BCLC 638; Winkler v Shamoon [2016] EWHC 217 (Ch); JSC VTB Bank v Skurikhin [2019] EWHC 1407 (Comm); Collins v Simonsen [2019] EWHC 2214 (QB); UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch).