Cambridge Law Journal, **83(3)**, November 2024, pp. 421–424
doi:10.1017/S0008197324000606

Rahman v Hassan [2024] EWHC 1290 (Ch) is a significant, albeit first-instance, decision on the *donatio mortis causa* doctrine. In 2015, Mr. Al Mahmood ("the deceased") and his wife, "Aunty", made wills leaving their residuary estates to the survivor in the first instance, and to Aunty's brother and three nieces ("the defendants") in the event that one predeceased the other. Mr. Rahman ("the claimant") was a distant relative of the deceased, upon whom the deceased and Aunty became increasingly dependent as they aged. Eventually, the claimant moved in with the deceased and Aunty. The deceased had several serious health conditions and was found to be fatalistic.

On 6 October 2020, Aunty died unexpectedly. On 15 October, a Mr. Amponsah visited the deceased to take new will instructions, and those instructions were that the claimant was to be his sole beneficiary. But the new will was never executed accordingly. On 20 October, having been told that Mr. Amponsah's execution visit was not due for another two days, the deceased explained to the claimant the login details for various online accounts and handed over bank cards, cheque books and login devices, pin readers and other security items to the claimant. He also handed over the registered land certificate for his house to the claimant, and said it was for him. He told him where the spare keys for the house were. In addition, the deceased handed over documents relating to two other properties over which he held long leaseholds, but not land certificates since these were no longer issued by the time in question. The deceased said, inter alia, that everything was now the claimant's and that he could take it now or wait until the deceased was dead, and that it did not matter whether Mr. Amponsah came to secure the execution of the new will or not. The deceased's health was poor, but by 22 October he refused to go to hospital, saying that there was nothing a doctor could do and that his time was short. Text messages the deceased sent to Mr. Amponsah and to the husband of Aunty's friend inter alia described the claimant as the absolute owner of all the deceased's assets. The deceased died in the early hours of 23 October, with the cause of death ultimately found to be bronchopneumonia.

The defendants proved the 2015 will, but the claimant successfully asserted that the deceased had made several valid *donationes mortis causa* (DMCs), "gifts in contemplation of death", in his favour on 20 October. Judge Paul Matthews upheld the claim, following a thorough analysis of both the law and the facts. In *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch. 221, at [50]–[60], Jackson L.J. summarised the

criteria for a DMC as requiring that: (1) the donor "contemplates his impending death" "in the near future for a specific reason"; (2) the donor "makes a gift which will only take effect if and when his contemplated death occurs"; and (3) the donor "delivers dominion over the subject matter of the gift to" the recipient, with "dominion" meaning "physical possession of (a) the subject matter or (b) some means of accessing the subject matter … or (c) documents evidencing entitlement to possession of the subject matter".

In *Rahman*, the judge held that the deceased was contemplating his death on 20 October, which occurred within three days. In addition, there was "no doubt" that what the deceased did on that day, anxious that he had not yet executed his new will, "was intended by him to be a gift to the claimant of the contents of the bank and other accounts and of the house and flats, conditional on his death" (at [153]). As for the relevant delivery of "dominion", this had been accomplished for the freehold estate of the house per se through the handing over of the land certificates (where the claimant already had the keys), for the leasehold properties through the handing over of the leases, and for the contents of the accounts through sharing of the login details and handing over of the cards and security devices. The result was that these assets were due to the claimant and fell outside the deceased's estate such that their destination was *not* to be determined by the 2015 will.

A different conclusion was drawn in relation to the furniture and other contents of the house (and of the contents of the leasehold properties as relevant). These were chattels and, even if he had intended that they should belong to the claimant, the deceased had made no attempt to deliver dominion of them. There had therefore been no valid DMC of these.

Probably the most important aspect of the decision in *Rahman* is the recognition of valid DMCs of registered land, particularly following the commencement of the Land Registration Act 2002. This was a matter left open in *Davey v Bailey* [2021] EWHC (Ch) 445. In *Rahman*, Judge Matthews acknowledged the potential "problem" (at [143]): the successful DMC in *Sen v Headley* [1991] Ch. 425 concerned *un*registered land, land certificates are not "indicia" of title in the same way as deeds are and, even if such certificates could be sufficiently analogised, since the commencement of the 2002 Act no further certificates have been issued and "neither the land certificate (if one exists) or any official copy of the register need be produced on any application to register dealings with the land" (at [145]). The judge appeared to accept that "[t]he title is the register, and that is that" (at [145]). Nevertheless, he expressly disagreed with N. Roberts, "*Donationes mortis causa* in a Dematerialised World" [2013] Conv. 113

https://doi.org/10.1017/S0008197324000606 Published online by Cambridge University Press

(see also e.g. D. Cavill et al., *Ruoff & Roper: Registered Conveyancing* (London, looseleaf), [32.013]) and held that *Sen* established that land per se could be the subject of a DMC, the constructive trust giving effect to a DMC could operate without signed writing in the case of either registered or unregistered land, and there was no conceptual basis to distinguish between the two. Relying on *Woodard v Woodard* [1995] 3 All E.R. 980, the judge asserted that "the function of the handing over of some document or thing to the donee is *evidential* rather than transitive" (at [150], emphasis in original). The handing over of the land certificate therefore sufficed in relation to the house and, even if the deceased had not had one, the handing over of an office copy entry of the register with sufficient donative intent would have sufficed. As for the flats, the handing over of the leases themselves would have been the obvious way to make a DMC of them if they had been unregistered, and again there was no good reason to treat them differently because they were registered.

In one sense, the decision in *Rahman* prevents an anomaly arising in the law by treating registered and unregistered land consistently. It is also helpful in confirming that "dominion" can be delivered via modern banking methods, in contrast to the focus on the now antiquated "passbook" in older cases such as *Birch v Treasury Solicitor* [1951] Ch. 298. In another sense, however, the acceptance of a DMC of registered land highlights the somewhat anomalous nature of the doctrine itself, potentially circumventing formality requirements and the land registration system even in the absence of detrimental reliance.

Rahman was decided in the shadow not of only of the coronavirus pandemic (the deceased complained of being unable to secure appropriate witnesses for his will, apparently unaware of the temporary video witnessing provisions in section 9(2) of the Wills Act 1837), but also of the Law Commission's *Making A Will* project. In its Consultation Paper (231, 2017), the Commission asked whether the DMC doctrine should be abolished or retained (Consultation Question 63). Perhaps even more significantly, however, the text messages sent by the deceased could have been considered "records demonstrating testamentary intention" admissible to probate under the Commission's provisionally proposed "dispensing power", despite their informality and notably without the need to satisfy the requirements of the DMC doctrine. Even an unsent text message was so admitted as a will under a dispensing power in the Queensland case of *Re Nichol; Nichol v Nichol* [2017] QSC 220. The Commission's final report is expected in early 2025, and it remains to be seen what they will recommend on both DMCs and a dispensing power, and whether those recommendations will be enacted. It is nevertheless noteworthy that, in future, the gifts in a case like

Rahman could be given effect with arguably even less regard for formalities, albeit with the aim of giving primacy to testamentary intention.

Commenting on social media, Alec Morris has questioned whether the deceased in *Rahman* contemplated his death for a sufficiently specific reason. That possible issue aside, his detailed consideration might well mean that Judge Matthews' conclusion on the DMC of registered land survives until the doctrine is potentially either abolished or largely eclipsed by legislation.

Brian Sloan

Address for Correspondence: Robinson College, Cambridge, CB3 9AN, UK. Email: bds26@cam.ac.uk

https://doi.org/10.1017/S0008197324000606 Published online by Cambridge University Press