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Unilateral intention and dishonesty in sham trusts

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Introduction

The modern notion of sham is articulated by Diplock LJ in *Snook v London West Riding Investments*.[1] We come to the oft-quoted passage explaining why car financing arrangements in question were found to be shams. There was a question of how it should properly be moderated into a trust setting. Of course, the touchstone is the 'shamming intention', but given a trust is an expression of the settlor's intentions, are his shamming intentions sufficient to vitiate the trust? Or is it necessary to look beyond to the intentions of the trustees? At the time of publication of the 17th Edition of *Lewin on Trusts* at the turn of the millennia, this question remained unsettled, but the editors' view was the settlor's intentions were what mattered, as a matter of principle:

> "[Regarding Diplock LJ's articulation of the test in Snook which we come to consider shortly] This form of words carefully fashioned in the multilateral context of a refinancing operation, does not transplant easily into the trust context. Where a trust is unilaterally declared, then there is no difficulty, as only the settlor's intention can conceivably be relevant. Where, on the other hand, trustees are made parties to a trust deed, there would still seem no good reason for their intention to be a relevant factor to be taken into account, given that the trust is complete without any element of acceptance by the trustees."[2]

The question was answered in 2003 with the decision of the Royal Court in *Re Esteem Settlement.*[3] This decided in favour of the bilateral enquiry, thus requiring proof of both the settlor's and trustee's shamming intentions.[4] The recent judgment of HHJ Matthews in *Taylor v Savik* takes a different approach, adopts different reasoning and comes to a different conclusion.[5] We come onto this but HHJ Matthews' decision has prompted the authors to re-examine the basis for the conclusions in *Re Esteem.* We submit that the foundations on which these rest are not as sound as had been thought with the result that the debate may not be as settled as had appeared.

We acknowledge that this is not an opinion shared by the leading cases, but these later cases relied on the Royal Court's analysis and do not heavily engage with the theoretical issues. Our core point is the necessary irrelevance of the trustee's intentions in the birth of the trust and the related distinction between the transfer of title and the creation of a beneficiary's equitable interest. Further, since the enquiry into the settlor's intentions is objective, concerns about the implications of the unilateral approach, which influenced the court in *Esteem*, are overstated. Regarding the other elements of the test, even if sham is bilateral, dishonesty on the part of the trustee is not a necessary ingredient. We do not think that Diplock LJ intended the phrase 'common intention' to be interpreted as requiring dishonesty. We explain that it is not consistent with the origins of sham or with its conception in

[1] [1967] 2 QB 786

[2] Lewin on Trusts Simpson at 4-023, 17th ed, 2000, John Mobray, Lynton Tucker, Nicholas Le Poidevin and Edwin Simpson.

[3] *In the Matter of the Esteem Settlement (Abacus (CI) Limited as trustee), Grupo Torras SA and Culmber v Al Sabah and four others* 2003 JLR 188

[4] Such proof must occur on the balance of probabilities. A shamming intention is a frequently used shorthand found in many of the leading judgments and describes an intention that the true arrangement be different to that reflected in the purported arrangement. The authors use the term purported, not written, as there seems no bar to a finding that an oral declaration of trust is a sham in principle (although in practice a trust whose validity is worth litigating is unlikely to be established orally), for which see: Le Poidevin, *Trusts: A Practitioner's Perspective*, within *Sham Transactions, Simpson & Stewart, 2013 Oxford University Press,* at 8.02.

[5] [2024] EWCC 7

employment and land law and believe that HHJ Matthews is correct in *Taylor v Savik* in refocussing on the key question which is whether act or document is, in fact, pretend. In the event that these points do not find favour, we contend that dishonesty is now assessed objectively in other contexts; and that the same should apply to whether there is a shamming intention.

Part I: Sham as a unilateral question in trusts law

(1) Setting the scene: sham pre-*Esteem*

One cannot start an article on sham trusts without quoting the oft-cited passage of Diplock LJ in *Snook v West London Riding Investments*, where Diplock LJ opens by saying that sham, "***if*** it has ***any*** meaning in law" (authors' emphasis, who make the point that it does not have distinct meaning in law) means "acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create". Diplock LJ then says:

> "But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co v Maclure* and *Stoneleigh Finance Ltd v Phillips*), that for acts or documents to be a 'sham,' with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived."[6]

We have already noted that *Snook* concerned a car financing arrangement and that there was some debate on how common intention in Diplock LJ's formulation should be applied into a trust setting. Before we get into how this was considered in *Esteem,* we contrast Diplock LJ's formulation with that of HHJ Matthews in *Taylor v Savik.* HHJ Matthews' judgment states that common intention is not required for a finding of sham and that Diplock LJ's proposition that a settlor cannot rely on a secret shamming intention is better explained by the doctrine of estoppel. The passage is worth setting out in full:

> 96. Diplock LJ went on to say, after the dictum cited above, that all the parties to the pretence 'must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating'. But this, with respect, goes too far. This is because in English law pretences are subject to the doctrine of estoppel. If one party adopts one view of the situation, and represents it as fact to the other, and the other relies on that representation, there is at least the potential for an estoppel to arise. If that estoppel arises, then the facts are as represented to the representee, and not as conceived by the representor. We see this, for example, in the famous case about the sale of old oats and new oats, Smith v Hughes (1871) LR 6 QB 597.
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> 97. There Blackburn J said (at 607):
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> > “I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v Cooke*. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.”

[6] [1967] 2 QB 786, 802

98. As a result, if A truly intends one transaction, but puts forward a document to B expressing another, the document is a sham. However, if B, looking at the document, does not realise that it is a sham, and agrees to its terms, then, although A and B do not in fact agree, there is a consensus between them by estoppel. As between A and B there is an agreement on the terms of the document put forward. As between A and B the terms of that contract (if that is what it is) can, as Blackburn J says, be enforced by B against A. As between them, A's unexpressed intentions are irrelevant. But there is no estoppel as against A in favour of any other person who has not been deceived by and relied to his or her detriment on the sham. As against that other, A is at liberty to assert the sham nature of the document, and to express A's previously unexpressed intentions.

99. Thus, where A puts forward a sham document to B, and B simply goes along with it, neither knowing not caring whether it is true or not, B cannot claim to have been deceived by it or to have relied on it to his or her detriment. Hence as between A and B there is no estoppel, and A can assert his previously unexpressed intentions. On the other hand, any third party to whom the sham document is shown who is deceived by and relies on it can set up the estoppel, and prevent the assertion of previously unexpressed intentions. And this is why Diplock LJ concluded (at 802F) that:

"No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived."[7]

This position directly contrasts that in *Esteem,* where it was stated that "the court must find that both the settlor and the trustee had the intention that the true position should be otherwise than as set out in the trust deed which they both executed."[8]

The analysis that underpinned this is found in paragraph 53(a)-(m). However, the authors question the conclusions contained in this paragraph and, consequently, the conclusion the bilateral model is preferable to the unilateral one.

(2) Trusts: creatures of unilateral creation

It makes most sense to deal with a point the Royal Court takes last, which is that the question whether the trust is constituted is dependent solely on the intention of the settlor. The reason this is the logical starting point is that if constitution results in a trust conferring interest on third-party beneficiaries, that trust cannot be undone by the trustee's intentions which, even if occurring simultaneously, are decisively irrelevant in the question of whether the beneficiary acquires an interest. The question whether the trust is constituted turns on the answer to the question 'has the intended trust arisen?'. Constitution of the trust is commonly thought to happen either by the settlor self-declaring a trust over the property *or* transferring the property to the trustees to hold trust for the beneficiaries. The Royal Court questioned the unilateral character of these propositions but said even *if* it were correct, "other considerations upon which [the court relies] outweigh this particular point." Our argument here is twofold: (1) that the proposition a trust is constituted unilaterally is more fundamental than the court appeared to consider; and (2) that the other factors identified in paragraph 53 are not sufficiently significant to outweigh this principle. Let us start with the first of these (the fundamental principle that a trust is constituted by the settlor alone) and come onto other factors in later sections.

The key authority for the proposition that trusts are constituted unilaterally is *Mallott v Wilson*.[9] In *Mallott*, the settlor had executed a deed in 1866 both creating an irrevocable voluntary settlement and transferring real and personal property to a trustee to hold on trust for the settlor's wife and children. The document was never executed by the trustee, who, some time later in 1867, executed a deed poll disclaiming the property and trust. Following this, the settlor dealt with the property in another manner. The question of law that arose was whether the beneficiaries under the 1866 deed acquired an interest in the property upon the original deed being executed by the settlor and

[7] [2024] EWCC 7, [96]

[8] [2003] JLR 188, [54].

[9] [1903] 2 Ch. 494

which passed to the plaintiff under the beneficiary's will or whether the property reverted to the settlor and passed differently under his will.[10] There was no question in the court's mind that, despite the trustee's lack of assent and later disclaimer, title to property forming the trust fund passed from the settlor to the trustee prior to disclaiming. Byrne J held that the effect of the 1866 deed was that "the whole of the legal estate [title] passed to William Carr [the trustee] and continued in him up to the time of the disclaimer". As to whether the trust was validly constituted irrespective of the trustee's disclaimer, Byrnes J said that:

> "the trust was really created, and that the fact that the trustee subsequently disclaimed did not destroy the trust, but that upon the revesting the settlor himself held in trust; and I arrive at this conclusion, not by construing that which was intended to be a deed operating by a transmutation of possession and the creating a third person trustee, as though it had been a declaration of trust, **but** by construing it as having created the trust, and the settlor as having subsequently become trustee of it by reason of the action which took place. It is really imposing the trust on the legal owner in whom by operation of law the estate is revested after the creation of the trust".[11]

Crucially, Byrne J is seeking to distinguish the facts of the case from those in *Milroy v Lord*, which Byrne J states stands for the proposition that "what is required of the settlor is that he should part with his property if he intends it to operate by way of a conveyance upon trust. And, moreover, this is an established rule, that the court cannot construe an incomplete gift as being a declaration of trust". The court in *Esteem,* however, states that:

> "Notwithstanding a passing obiter approval by the English Court of Appeal in *Harris v Sharp*, it seems at least arguable that the decision in *Mallott v Wilson* was incorrect. In particular, it is said to be inconsistent with the classic statement in *Milroy v Lord* [which states that] being alternatives, an intended transfer to a trustee which fails is not construed as a declaration of trust."[12]

The authors, however, submit that it is not arguable that *Mallot v Wilson* is inconsistent with *Milroy v Lord*. First, in *Mallot* Byrne J is clear that the estate re-vested in the settlor after the trustee/donee disclaimed and, as such, legal title to the property must have vested in the trustee for some time. This is a clear distinction from *Milroy*, where the settlor never divested himself of legal title. It is therefore, as Byrne J states (above), not necessary to interpret the deed as being a self-declaration of trust (which would be inconsistent with *Milroy*), because the deed creates the trust when title vests in the trustee, however temporary.

Our second submission is that even if the temporary vesting of title in the trustee is not considered sufficient in and of itself to constitute the trust, *Mallott* must be consistent with the ruling in *Milroy* following the clarification of what is required of a settlor to constitute a trust following the *Re Rose* case. As noted by Lady Arden in *Pennington v Waine*, "[b]efore long, equity had tempered the wind to the shorn lamb (ie the donee). It did so on more than one occasion and in more than one way".[13] In *Re Rose*, the court held that the idea that 'equity would not assist a volunteer' did not apply when *"*the donor had done everything that was necessary for him to do*".* In such instances, a trust was constituted over the transferor's property. *Re Rose* concerned a transfer by Mr Rose to his wife. During the period between the execution of the transfer and the registration of Mrs Rose's name in the company's share register, it was found he held the shares on trust for the donee. With respect to *Mallot*, surely it is the case that upon executing the deed which had the effect of vesting legal title in the trustee (however temporarily), everything that needed to be done on the part of the settlor to constitute the trust had been done. Otherwise, there is no point in considering what happens when the trustee *dis*claims. This encapsulates the core of the point in *Milroy* that the 'transaction or intended transaction left by [the settlor] imperfect and incomplete' caused the deficiency.[14] There is

[10] Irrevocable as the deed contained no power of revocation.

[11] Ibid At 503.

[12] [2003] JLR 188 at 53(h)

[13] [2002] EWCA Civ 227, [59]

[14] Knight Bruce LJ in *Milroy v Lord* 4 DE G.F. & J. 264

no such deficiency on the part of the settlor where the trustee disclaims, and so *Mallot* most definitely falls closer to the *Re Rose* principle than it does the facts of *Milroy*.

Now, it is of course true that in *Re Rose*, the failed transfer was of outright legal title, rather than being a case directly about the constitution of the trust, but that did not matter to the judges in *Re Rose* and does not matter here. As noted by Evershed MR when reconciling *Re Rose* with *Milroy*, it was the fact that in *Milroy* the settlor, Mr Medley, had not done everything that *he* needed to do to affect the transfer to a trustee on trust for his niece. He had used the wrong form of transfer (which was not in compliance with the regulations of the company) for the purported transfer. This meant the niece could not assert an equitable interest. Since the shares remained registered in Mr Medley's name, the transfer of the legal title would only be effective upon entering the change of shareholder on the company's share register, and no such change occurred. As is clear from Evershed MR's judgment in *Re Rose*:

> "The plaintiff, Mrs Milroy, claimed to be entitled, as beneficiary under the deed, to the shares to the exclusion of Medley's estate. The Court of Appeal rejected that view. It is plain that the basis on which they so decided was that this purported gift was incomplete or imperfect in this sense, that the donor had not done all that lay in his power to do in accordance with the terms on which the shares were held by him to make his gift effective and to divest himself of his beneficial and other interests in the shares. It is pointed out, for example, by Knight Bruce L.J., 'He might, however, have affected the legal title. It was in his power to make a transfer of the shares so as to confer the legal proprietorship on another person or other persons. But, as I have said, no such thing was done.' Turner L.J. emphasised the point when he says that the shares were never vested in Lord, and the only ground on which he can be held to have become a trustee of them is, that he held a power of attorney under which he might have transferred them into his own name; but he held that power of attorney as the agent of the settlor. Then he observes that, the settlor having died, the power ceased with him."[15]

It is clear, therefore, that the ruling in *Re Rose* had in mind that this principle moves between outright transfers of legal title and transfers on trust. This is because, irrespective of whether one characterises the trust in *Re Rose* as constructive or express, Evershed MR is clear that Mrs Milroy did not take as beneficiary *under the deed* because the settlor had not done everything necessary to divest *himself*.[16] Two corollaries follow from this: (1) that had the settlor done everything necessary for him to do, Mr Medley's niece in *Milroy* would have equitable interest by the deed; and (2) the relevant question is whether the settlor had done what is required to *divest himself* and cannot be whether the title permanently vests in the trustee (ie does not disclaim). Such is the distinction between the constitution of the trust and successful transfer of title to the trustee.

While the authors acknowledge that *Re Rose* was decided some time after *Mallot v Wilkins*, when answering the question of *Mallot's* consistency with *Milroy,* comparisons between the cases are fair game, particularly when *Re Rose* seeks to articulate the true nature of the principle in *Milroy.*

Furthermore, while the authors have not found an endorsement of this rationalisation between *Mallot* and *Milroy* through the lens of *Re Rose,* recent consideration of the case of *Mallot* in the English courts acknowledges a distinction between the effect of the trustee's intentions on two separate issues: (1) whether the trust takes effect over the property; and (2) whether the trustee takes office. The former is clearly relevant to whether a sham has occurred, the latter is not. In *Mackay v Wesley,* Meade J considered the effects of *Mallott* on the question of whether a trustee had to accept the appointment to office for it to be effective. The judgment endorses the submissions of Nicholas Le Poidevin that *Mallott* is "primarily about whether a settlement binds the settled property, or alternatively must fail, when the trustee disclaims. It is not about the precise status of the intended trustee prior

[15] [1952] Ch.499, at 509

[16] Additionally, whether the trust that arises is constructive or express arguably has no bearing on the question of whose intentions are relevant in the context of sham, with the question here being whether the beneficiary acquires the purported interest at all irrespective of the trustees intentions.

to disclaimer".[17] While the judge noted that the *Mallott* had been doubted in *Esteem*, he here encapsulates the key issue, which is that while a trustee must consent in order to take their fiduciary duties under a trust (the court noting *Evans v John*[18]), that is a different question to whether the trust takes effect at all over the property. The *Esteem* judgment's concerns on this point regarding trustee consent are therefore in the opinion of the authors misstated.

For these reasons we would disagree with the Royal Court in *Esteem*. It is not only 'in some circumstances' that a trust will be constituted where the trustee disclaims. Rather, it is a rule of general application that illustrates that only the settlor's intentions are relevant in ascertaining whether a valid trust arises. In reaching this conclusion, we do note that there are circumstances where a trustee declining can prevent the trust from arising on specific facts. For example, where the identity of the trustee is a key factor (see *Re Lysaght*[19]). However, we again submit that such instances are also the product of the unilateral model. In the unconventional instance where identity or residence of the trustee is a pre-condition (as was the case on the facts of *Esteem*[20]) to the trust taking effect, that is solely because it is a pre-condition of the settlor's intention for the trust to take effect. The only reason such clauses can be relevant within trust deeds, given the rule in *Mallott*, is through a construction of the settlor's intention. They cannot, in and of themselves, change the criteria for creating a trust from a unilateral to a bilateral model. This is seen in the fact that, if there was a clear mistake as to the terms of such a clause requiring a specific trustee/domicile and rectification was sought, it would be the settlor's intentions that the court would seek to ascertain when considering a claim for rectification. The court would not seek to ascertain whether the trustee was mistaken (and what their intentions were), as their intentions are irrelevant to the settlement and the question of whom the settlor wishes to be a trustee over the property.

(3) Whose intentions? Cars, titles and trusts

We now turn to the other factors that persuaded the court in *Esteem* to favour a bilateral approach to sham trusts starting with what the court in Esteem expressed to be the requirements for a valid transfer of title. We come on to explain how the relevance of the donee's intentions to such transfer is not to be equated with the trustee's intentions in the constitution of the trust with the result that such intentions (which per *Mallott* are irrelevant) become relevant. In this section, therefore, we rebut the negative consequences that would follow on the Royal Court's analysis from the adoption of a unilateral model based on what we submit to be an incorrect analogy between transfers of title and the constitution of trusts.[21] Principally, analogies to transfers of title do not demonstrate that on the unilateral model of sham the settlor's 'secret' intention would vitiate the trust.

The relevant passage is:

> The law has always placed great weight on documents knowingly entered into. The consequences of the plaintiffs' argument need to be considered. Let us suppose a case in which A executes a formal deed of gift of his car to B but, unknown to B, secretly intends that he should really only lend the car to B so that he retains the beneficial interest in the car. The car is delivered to B who then treats it as his own for many years. A continues to say nothing of his secret intention. According to Mr. Journeaux, the gift is nevertheless invalid because A did not in truth have the necessary donative intent at the time of the purported gift. He accepts that the law could not allow A to reclaim the car after many years in such circumstances, but he asserts that he is prohibited from doing so by application of the doctrine of estoppel rather than by the gift being treated as valid. He accepts that estoppel would prevent A (and his estate)

[17] *Mackay v Wesley*, [2020] EWHC 3400 (Ch) at [25]

[18] *Evans v John* (1841) 4 Beav. 35. In this case, the trust money was misdealt with but one of the trustees was held not liable, even though aware of the trust, on the basis that he had not accepted his appointment.

[19] [1966] 1. Ch. 191

[20] Paragraph 53 (h), where counsel submitted that the settlor in *Esteem* cannot have intended for a trust to have arisen where the settlor disclaimed due to tax implications. The very fact this is expressed in terms of the settlor's intentions reflects the point the authors go on to make.

[21] It should be noted that this article does not seek to deal with the precise operation of sham in the context of legal transfers, which are bilateral transactions (see below).

> from attacking the gift but he does not accept that A's trustee in bankruptcy would necessarily be estopped and he asserts (which assertion was accepted by the Abacus) that a creditor, who is a third party to the transaction, cannot be so estopped. It follows that, for practical purposes, the gift would be treated as valid as between the parties but not as against third parties, no matter how long a period had intervened and no matter that the donee had acted in good faith throughout.[22]

DB Birt then states that "the same analysis applies for transfers into a trust", such that on the unilateral model, only the doctrine of estoppel would prevent a secret intention from undermining the arrangement. The role estoppel plays in this situation has been touched on already; the settlor would be precluded from denying the representation made in the document (that there is a valid trust) to a party who has relied on such a the representation (including perhaps a purported beneficiary).[23] However, this example of the gift of a car to B merges what are two questions: (1) is the transfer effective at law; and (2) is the property, which is the subject to the transfer, *whether that transfer is successful or not*, subject to a trust? We contend that (1) is a question which is bilateral, while (2) is not, and is purely subject to analysis above regarding *Mallott*.

HHJ Paul Matthews in the case of *Scott v Bridge*[24], explains that at common law a gift is a bilateral transaction to which each party must consent, with reference to fundamental caselaw applicable to personal property:

> "A gift is often considered to be an entirely unilateral transaction, perhaps because it is not a (simple) contract. […] But in fact, at common law, a gift is a bilateral (or multilateral) transaction whereby property in a thing is immediately and gratuitously vested by its owner in another or others. However, in English common law, each party to a gift has to consent to it, even though in some cases the relevant consent may be supplied by way of a presumption, and if the presumption is rebutted there is no gift." [25]

We come on to consider the approach to interpreting the donor's intentions shortly. So far as the donee's intentions are concerned, HHJ Matthews goes on in *Scott* to note that there is a "presumption that, when a gift of property is made, the donee is presumed to accept it unless, upon learning of the gift, the recipient repudiates it"[26]. Such a position aligns with the decision that is relied on by the Royal Court in *Esteem*, *Chase Manhattan Equities v Goodman*[27], which held that bilateral shamming intent was required in an instance of gift by deed. This article does not seek to provide in depth detail of the operation of 'sham' in bilateral transactions. This is because we believe the question whether a trust is a sham turns on unilateral and objective factors at the time of constitution. It is not necessary or helpful to merge this into the question whether the transfer is valid (where different factors pertain). However, if the position (as is also argued historically below) is to ascertain the real transaction that occurred, in bilateral transactions (such as contracts), subjective intentions should only be relevant as far as the existing law governing the formation of the transaction allows. Of course, these common law rules as to when a transaction is complete have been tempered by statutory registration.[28]

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[22] [2003] JLR 188 at 53(b).

[23] Confirmed to apply in this context in *Taylor v Savik*, but estoppel by representation has a broad application. Key to the doctrine are a representation as to fact or law, relied upon by the representee, such that they would be detrimentally affected by such reliance if the representor could deny the representation as between those parties: Per Carr J *in Spliethoff's Bevraschingskantoor v Bank of China* (2017) 1 All ER (Comm) 1034 at [156] (as subsequently cited in *Jones v Lydon* (2021) EWHC 2321 (Ch) at [61]-[62])

[24] [2020] EWHC 3116 (Ch)

[25] Matthews does so on the basis of the foundational case in the context of personal property law, *Cochrane v Moore* (1890) 25 QBD 57, Lord Esher MR said (at 76): "It is a transaction consisting of two contemporaneous acts, which at once complete the transaction, so that there is nothing more to be done by either party. The act done by the one is that he gives; the act done by the other is that he accepts. These contemporaneous acts being done, neither party has anything more to do."

[26] Citing as authority: *Townson v Tickell* (1819) 3 B & A 31, 37- 38; *Standing v Bowring* (1885) 31 Ch D 282, CA, 285, 288, 290.

[27] [1991] BCC 323 at 328

[28] For example, in the context of transfers of registered land, see s58(1) LR A 2002, which states that upon registration as a proprietor of a legal estate the estate vests in the person registration by virtue of the registration even if not so otherwise vested. Of course, with respect to chattels or land outside a registration system, such considerations do not apply.

To underline the point that the question of whether title is transferred is different to whether a trust arises with *respect to the rights transferred*, we point to the passage of Underhill and Hayton's Trust and Trustees written before the *Esteem* decision which states a trust is fully constituted when *"the settlor effectively transferring certain property to trustees **and** declaring the trusts upon which the trustees are to hold such property."*[29] There are two questions within this statement (illustrated by 'and'), one concerns the transfer, the other the trust. While both must be answered in a specific way for the trust that the settlor has planned for to take effect (the one where the trustee holds on trust), our above analysis regarding *Mallott* demonstrates that the true characterisation of the first leg does not incorporate any requirement as regards the trustee's intentions. It is sufficient that the settlor has put the trustee in a position to accept the trust, having done everything necessary. A trust can therefore still be constituted unilaterally, solely on the basis of the settlor's intentions. This illustrates the separation between instances of transfer and the constitution of trusts. For the former to endure, the transferor must accept (or at the very least, not disclaim), but that is not true of the latter.

As such, while we accept similarities between the gift of a car by deed and the *transfer* of property title to a trust in that they are both bilateral in nature, when it comes to whether there is a sham, it is a question of whether a trust arises in favour of the beneficiary at all. The transfer of title question is not directly relevant to this. For example, consider the situation where a settlor transfers a car to a trustee on trust for a beneficiary. The trustee is free to decline both the office and the transfer. In such an event, *Scott v Bridge* tells us that in doing so they will be displacing a presumption of acceptance for the transfer, and they will also be declining the office of trustee in line with *Mackay* and *Evans v John* (see above). It does not follow, however, that the settlor will be free to deal with the property as he wishes, as a trust can still be constituted (as was the case in *Mallott*). Therefore, the alignment of the transfer of title to a car to a transfer into a trust, while both questions are bilateral, does not conclusively guide us on whether a trust is void for sham on the basis of unilateral or bilateral intentions. This is because the consequences of a settlor's secret intention in such instances need not affect whether a trust takes effect at all.

Additionally, this separation between the bilateral nature of transfers and the unilateral nature of declarations sits better with the case law on whether subjective or objective intentions are relevant in each scenario. In the context of transfers of title, it seems the test of intention is subjective as noted by HHJ Matthews in *Scott v Bridges*,[30] on account of *Howard v Fingall:*[31]

> “In order to make a valid gift, there must be perfect knowledge in the mind of the person making the gift of the extent of the beneficial interest intended to be conferred, and of which it is intended to divest oneself in making it.”

By contrast, it is noted within paragraph 53 of *Esteem* that, in determining whether there is certainty of intention to create a trust, the court employs an objective enquiry, quoting *Twinsectra Ltd v Yardley,* where Lord Millet stated that:

> "A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter them."[32]

Such a position is affirmed by the likes of *Byrnes v Kendel* (amongst others), which state that "the relevant intention is that manifested by a declaration of trust".[33]

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[29] The passage quoted to the court is from the 16th Edition of Underhill & Hayton, Law Relating to Trusts and Trustees, 144 (2003).

[30] HHJ Matthews confirms this approach in *Scott v Bridge* at [121]: 'the donor's intention to give the thing [is] subjectively and not objectively ascertained'.

[31] (1853) 12 LTOS 12, 13 col 1

[32] [2002] UKHL 12

[33] French CJ, [2011] HCA 26.

Without insisting on a clear separation between the requirements for a transfer of title and creation of a valid trust, there can be a clear conflict between case law on subjective and objective intention. In the authors' submission, it is this overlap which has contributed to the confusion over whether subjective or objective intentions are relevant in an instance of sham. We submit that such a separation provides an explanation as to how and why evidence of the settlor's objective intention should ground a sham claim that no trust arose. As noted by Wylie J in the New Zealand case *Rosebud Corporate Trustee Ltd v Bublitz*:

> "Contemporary evidence of the actions and words of the relevant parties showing that the trust was not intended to be genuine can be taken into account, as can subsequent conduct where that conduct enables the court to ascertain the objective intention that the trust was to be a sham at the time it was set up."[34]

While considering the argument for the unilateral model, it is not the parties' intentions that are relevant but only the settlor's. The question becomes, as has been identified by proponents of the unilateral model such as Palmer, McFarlane, and Douglas: would someone looking at the situation (a reasonable addressee) think that the settlor intended for there to be a valid trust? Evidence of the settlor's actual intention may, of course, be relevant here, but not insofar as it is 'secret', as we have established above that secret intentions are not relevant in the question of whether a trust is constituted.

(4) Charging clauses, partial shams and trustee indemnification

We deal lastly with some ancillary points considered in *Esteem* which, in our submission, do not lead to the conclusion that the sham enquiry is bilateral in the context of trusts. At 53(l), the court states that:

> "We think that there is some force in Mr. Clyde-Smith's point that a settlement of the type which we have before us is not a wholly unilateral transaction. Thus, the deed contains a number of matters which deal with the position of the trustee, such as its right to remuneration, the trustee indemnity, retirement and appointment and generally the terms upon which the trustee is willing to act. Clearly a trustee will consider very carefully the terms of a trust deed which is put to it and will often require some change before it is willing to execute it."

However, the inclusion of such provisions would not, in our submission, preclude a court from separating out the unilateral (whether there is a trust) and bilateral (whether trustee entitled to remuneration) elements of an agreement. As Nicholas Le Poidevin has noted, "it seems quite possible in principle for the trust instrument to be a sham only in part, though the question is not explored in the authorities. A trustee who is party to the settlor's shamming intention is likely, for example, to wish to be able to rely on a charging clause and an exoneration clause".[35] Going further however, the authors of this article argue such a position is inherently clear. As HHJ Matthews reminds us in *Taylor v Savik*, it is acts and documents which are shams, not the arrangements themselves. The court regularly strikes out certain effects of documents and leaves others untouched.[36] In the context of sham, we submit that this already occurs in the context of employment contract shams. In such a case, the court can separate the effective provisions from those that are invalid. We would not seek to declare that the entire agreement between a worker and employer was void on the basis of the effect of one clause, and the same approach can apply in the context of documents which purport to create a trust.

[34] [2014] NZHC 2018 at [92].

[35] Le Poidevin, *Trusts: A Practioner's Perspective*, within *Sham Transactions, Simpson & Stewart, 2013 Oxford University Press,* at 8.08

[36] We also note the possible application of statutory rules on trustee rights to indemnification and payment in this context.

Part II: Dishonesty and its role in sham

We recognise that the courts have disagreed with the application of a unilateral understanding of sham and therefore turn to consider what must be established for a finding of shamming intention on the part of both settlor and trustee. The modern rationale of sham is stated to be based on dishonesty; this is because "an allegation of sham carries with it a degree of dishonesty".[37] The editors of Lewin note that the authorities have developed to state that disregarding a document agreed upon by the parties is an exception which is only warranted by a finding of dishonesty. They explain:

> "It is difficult to establish the necessary intent '[b]ecause a finding of sham carries with it a finding of dishonesty, because innocent third parties may often rely on the genuineness of the provision or agreement, and because the court places great weight on the existence and provisions of a formal signed document'".[38]

This approach stems from the few words in Diplock LJ's formulation "the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating". We question whether Diplock LJ intended common intention to amount to dishonesty. We explain it is not consistent with the origins of sham or with its conception in employment and land law and believe that HHJ Matthews is correct in refocussing on the key enquiry which involves looking behind the pretend act or document at the true transaction, whether the curtain was raised dishonestly or not. If these points do not find favour, we contend that dishonesty can be assessed in other contexts objectively; and that the same should apply to whether there is a shamming intention. Thus, the Royal Court in *Hanson*[39] could be said to be going too far in requiring a positive subjective intention to mislead third parties and/or the court.

(1) Dishonesty and its omission from early case law

Firstly, before even casting our eye to *Snook*, we would remind the reader that the idea of a sham did not materialise out of thin air. As recently highlighted by HHJ Matthews in *Taylor v Savik*:

> "In his poem Annus Mirabilis, published in 1967, Philip Larkin stated that sex had been invented in 1963. Whilst, given the age of the human race, that seems somewhat unlikely, it is clear that many English lawyers similarly believe that the law of sham also began in 1967, with the well-known dictum of Diplock LJ in *Snook v London* and *Western Riding Investments Ltd* [1967] 2 QB 786, 802."[40]

Like most English legal history, precisely *why* and *how* sham has arisen as a term of art is not entirely clear. We are fortunate that Mike Macnair had conducted an archaeological survey to try to answer this question.[41] He explains that the late seventeenth-century slang expression passed into legal usage in the 1690s. He draws attention to the related term 'colourable' which was a 'cognate' of sham. These concepts frequently arose in situations that included a misleading appearance, but this was the byproduct, not the engine of what these terms meant. Rather, they were grounded in the factual situation itself. This can be seen by considering a few of the cases that are the focus of Mr Manair's research.

[37] *National Westminster Bank v Jones* [2000] 6 WLUK 556 at [46]

[38] Lewin, 20th Edition 2020, Tucker, Le Poidevin, Brightwell 5-021

[39] *Joint Administrators of the Estate of the Late James Donald Hanson and Anor. v Arbitrage Research and Trading Limited S.A. and Ors* [2021] JRC 319

[40] [2024] EWCC 7 at [93]

[41] Macnair, 'Sham: Early Uses and Related and Unrelated Doctrines' in Sham Transactions (Simpson and Stewart, 2013)

The *City of Oxford* case of 1689[42] concerned an arrangement which had the effect of removing a townsperson from the jurisdiction of the ordinary court and placing him under the jurisdiction of the Vice-Chancellor. This arrangement was reached two days prior to his appointment to the office; the townsperson became registered as a servant attendant to a 'Dr Irish' of the university. This privilege was 'denied by the whole court'. In other words, it was found to be a sham arrangement. We submit that the better articulation of modern-day sham hinges not on intentions to mislead and deceive, but rather should be an enquiry into the true transaction that occurs by application of the standard on when the effects of a transaction arise. Such an approach, we submit, has been followed in spheres such as employment and land law with respect to sham and should similarly be adopted in the contexts of trusts. Macnair brings our attention to the similar use of the term 'colourable' in early legal history alongside sham. Prior to its absorption into sham, there seems no requirement to be intentionally dishonest. See, for example, *Wood v Dixie*:

> "two questions were put: first, whether the transaction was colourable, that is, whether there was an absence of intention to pass the property, in which case there would properly be no transaction; secondly, supposing that there was such a transaction, that is, not a colourable but a real one, still, whether the jury thought the intention was to defeat the execution creditor; in which latter case, they were told the whole would be void". [Note: the second question is a misdirection][43]

Crucially, the term colourable is expressed as an absence of the requisite intention to give effect to the transaction. In our submission, the term's alignment (and subsequent conflation) with sham goes to show that the question was originally one which seeks to ascertain the real transaction, and whether there was an intentional pretence as to the nature of the true transaction is therefore a conclusion which falls out in the wash.[44] As a final example, we direct the reader to a passage by Grant MR in *The William*:

"Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some place other than the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm, that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? **The truth may not always be discernible, but when it is discovered, it is according to the truth and not according to the transaction that we are to give the transaction its character and denomination**." [45]

In the authors' opinion, the emphasis here is surely on ascertaining the true *transaction,* just as it was necessary to ascertain the real journey, which in the context of trusts, depends on objective intention and not a finding of dishonesty. Having considered some of the early caselaw, let us turn to the leading case of *Snook*.

(2) A closer look at *Snook*

We again set out the relevant passage of Diplock LJ in *Snook*.

> "I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the D appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co v Maclure* and *Stoneleigh Finance Ltd v Phillips*) that for acts

[42] City of Oxford Case (1689) Ventris 106, 86 ER 335, Common Pleas

[43] (1845) 7 QB 892; 115 ER 724 at 896/725-6. The authors note the almost artistic similarity between this misdirection and the modern provisions in s.423 of the Insolvency Act, often used as an alternative claim to alleging sham.

[44] Macnair states that, with reference to various used of colourable, a motive to avoid regulatory affect is decisive, but does not require express proof and can be inferred from the circumstances.

[45] (1806) 5 C Rob 385; 165 ER 817 at 395-7/821-2

> or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

It can be seen that Diplock LJ makes no mention of 'dishonesty'. Instead, the expressed requirement is that of intending to give third parties or the court the appearance of creating legal rights and obligations different from the actual rights and obligations intended to be made. While the question of whether an equitable interest is a property right properly so called is intensely debated, the fact that such an interest *can* have third-party effects means that, by purporting to create a trust whilst at the same time harbouring no such real intention, the parties would prima facie give a false impression to the world at large, who may be bound by such a beneficial interest.

The lack of a requirement for dishonest intent accords with *Stoneleigh Finance Ltd v Phillips*[46] which is cited by Diplock LJ in Snook.

In *Stoneleigh Finance,* Sellers LJ states the following when considering whether a transaction was a bona fide sale (as the documentation suggests) or a charge against a chattel, the latter being disadvantageous to the parties due to the regulation of such transactions as Bills of Sale:

> "The issue is one of fact. In its investigation into the facts it is the duty of the court to discover the true nature of the transaction; to see whether the documents are a genuine statement of the intended transaction or are entered into only to clothe the real transaction in a deceptive manner."[47]

The authors' reading is that Sellers LJ seeks to answer the question of what the true nature of the transaction is. He is not asking whether there is an intention to mislead third parties, let alone whether this is a dishonest intention. The final words in the quoted passage, "*or are entered into only to clothe the real transaction in a deceptive manner*", are not inconsistent with this interpretation. This is because Sales LJ goes on to adopt an interpretation of the facts of the case to see what transaction would arise, without consideration of whether the parties are subjectively dishonest:

> "In my view, that essential fact of delivery of the goods and the payment of the price alleged to be agreed not being present here and the other inaccuracies referred to, negative a bona fide sale and leave the present case, properly interpreted, as establishing agreements which are the type of transaction which the provisions of the Bills of Sale Act, 1878, the Bills of Sale Act (1878) Amendment Act, 1882."[48]

While such a situation is obviously misleading, the fact it is misleading does not mean that an intention to mislead is necessary in ascertaining the true transaction.[49] In fact, we argue that the salient facts upon which Sales LJ here relies are best interpreted as considerations of the parties' objective intentions, what someone looking at the transactions would understand it to be intended to be. We go on to explore this argument below.

(3) Contemporary case law

In *Taylor v Savik*, HHJ Matthews deals with this subject as follows:

> "The question which then arises, at least for the present case, is whether an allegation that a document (or other act) is a sham by itself *necessarily* connotes an allegation of fraud or dishonesty. In my judgment, authority apart, the short answer to that is no. It all depends what you mean by sham."[50]

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[46] [1965] 2 QB 537

[47] Ibid at 560

[48] Ibid at 565

[49] We refer the reader to the point made above, that misleading consequences are the byproduct not the engine of sham. The 'duty' of the court to uncover the true transaction will occur whether the parties were dishonest or not.

[50] [2024] EWCC 7 At [100].

We have already quoted the passage about pretend transactions being the core component of sham. HHJ Matthews then takes the opportunity to demonstrate by examples across the case law on sham documentation that there need be no fraudulent or dishonest intent for a document to be held to be a sham, of which we provide one for the reader:

> "First, a person may put forward a document believing, or at least hoping, that it accurately states the transaction intended to take place. For example, a person may execute a document stating that it is an *inter vivos* gift, although it is subsequently held by the court to amount to a will: *Cook v Cocke* (1866) LR 1 P&D 241, 243. Or an owner of a residential property may consider that the arrangement he has proposed (in writing) to an intended occupier of the property is a licence, rather than a tenancy. The document accordingly refers to a 'licence'. But the court later holds it to be a tenancy: *Street v Mountford* [1985] AC 809, HL.[51] Here, the allegation of sham merely means that the document (or other act) does not accurately record the substance of the transaction. The proponent of the act may have intended the legal result but has not achieved it. The court looks to the substance of the transaction, and not to the form, or label: *A v A and St George Trustees Ltd* [2007] EWHC 99 (Fam)."[52]

Matthews HHJ's approach is again to focus on the substance of the transaction. In a declaration of trust, the substance of the transaction is contingent on whether and what intention is demonstrated to constitute a trust objectively and is not affected by standards of dishonesty. Additionally, we submit that there is authority to this effect which transplants to the trusts sphere.

First, we direct the reader to leading appellate decisions on sham documents at the highest level in the employment law sphere. In *Autoclenz v Belcher*[53]*,* Lord Clarke stated that:

> "I would accept the submission made on behalf of the claimants that, although the case is authority for the proposition that if two parties conspire to misrepresent their true contract to a third-party, the court is free to disregard the false arrangement, it is not authority for the proposition that this form of misrepresentation is the only circumstance in which the court may disregard a written term which is not part of the true agreement."[54]

Thus, "the question in every case is […] what was the true agreement between the parties."[55]

While the Supreme Court expressed that its comments were applicable in the sphere of employment law, we submit that this approach ought to have a more general application. It is uncontroversial that the true legal arrangement in contract law is determined on the basis of objective intention. While it may be true that doctrines such as inequality of bargaining power may operate slightly differently than in the trusts sphere, they still operate with respect to the core question of intention. As such, if a question of sham is about uncovering the true nature of the agreement (dependent on objective intention), the same approach should be followed in the trusts sphere.

Reinforcing this analysis is the fact that, in the trusts sphere, like much of the employment sphere, there is indeed an inequality of bargaining power between the trustee and the settlor. Namely, the settlor holds all the cards in determining the terms of the trust. Particularly with regards to professional trustees and those remunerated for their services, they can either accept the settlor's demands or lose the associated business. Therefore, while in our submission there is rightly no requirement for dishonesty de facto in either sphere, the considerations that have been used to justify the position in employment law apply additionally in the sphere of trusts.

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[51] (Authors footnote) In *Street v Mountford*, there was no suggestion of a requirement to mislead third parties or be dishonest.

[52] Ibid at [101].

[53] [2011] UKSC 41

[54] Ibid at [23]

[55] Ibid at [29]

(4) Why subjective dishonesty?

Alternatively, we suggest that, even if dishonesty is a constituent part of the sham enquiry, this falls to be decided objectively and not require a subjective and positive intention to mislead others. In the case of *Hanson*[56], sham was one of the grounds by which the validity of the trust was attacked. The court however held that even if the trustees could be held to be recklessly have satisfied the leg concerning common shamming intention it was "difficult to infer an intention to mislead third parties from mere indifference to the terms of a trust instrument. It is necessary for such an intention to be subsequently proved".[57] Respectfully, while *A v A* and *Pugachev* (authorities cited to the Royal Court) are arguably open to interpretation on the question of whether recklessness suffices to constitute common intention on all legs of the test, we contend that indifference does suffice for the following reasons.

First, the concept of dishonesty has broadened with *Ivey v Genting Casinos* displacing *R v Ghosh* such that there is now a two-stage test as to whether a person's conduct is dishonest whether that is in criminal *or* civil proceedings.[58]

1) What were the facts as subjectively known (on the balance of probabilities) within the person's mind?
2) Would the conduct assessed against those facts be considered by honest and reasonable persons to be dishonest? This is the inherently objective element.

This objective limb accords with the decision of Lord Nicholls in *Royal Brunie v Tan*: 'Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.'[59] Likewise in *Jones v Gordon* Lord Blackburn described a person who “refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover…I think that is dishonesty".[60]

Arnull points out that a subjective approach to dishonestly means the test for sham is more demanding than that the equivalent test for criminal liability. [61] The rationale given for this surprising state of affairs is legal certainty, but if we are right and sham is dependent on unilateral and objective factors, legal certainty becomes less of an issue as the secret intentions of settlor could not be said to have any role in vitiating the trust (leaving aside questions of estoppel). It is submitted that what is missed in *Hanson* is that, while the trustee's subjective intentions are relevant to the first leg of the test, the court can and does consider this evidence carefully having regard to objective factors. A trustee who contends for an unreasonable subjective intention will not be believed. The already quoted passages from Lord Nicholls in *Royal Brunei* and Lord Blackburn in *Jones* are examples of this.

This article submits that a trustee who purports to undertake obligations to beneficiaries was dishonest when he recklessly or deliberately failed to ask the appropriate questions which would have revealed the settlor's true intentions for the arrangement. We have previously noted the court's approach to interpretation and that intentions are assessed objectively. Our primary submission is that an objective analysis of the settlor's true intentions can satisfy such recklessness. Even if the trustee's subjective intentions are relevant to the refusal to enquire, as soon as we reach the conclusion that the trustee *should* have known that the settlor had a shamming intention (a pre-

[56] [2021] JRC 319

[57] Ibid at [22]

[58] Ivey v Genting Casinos [2017] UKSC 67 and R v Ghosh [1982] QB 1053

[59] [1995] 2 AC 378 At [43]. See also Armitage v Nurse [1998] Ch. 241 and 'reckless indifference' constituting the necessary dishonesty for breach of the obligations a trustee owes in loyal as a core obligation.

[60] *Jones v Gordon* (1877) 2 App Cas 616 at 629

[61] Thomas Arnull, 'Sham Trusts and the requirement that a shamming intent be shared: *Administrators of the Estate of Hanson v O'Leary and Ors',* Trust & Trustees, Vol.28, No.5 June 2022, pp 405-412.

requisite as purely subjective and secret intentions are not relevant, only objective ones), a refusal to enquire constitutes the knowledge to satisfy the first leg of the *Ivey* test (with the second leg being answerable in the affirmative on the basis that an honest and reasonable person would make an enquiry where the settlor intends to commit a fraudulent activity).

Conclusion

We noted at the start of this paper the position as described in the 17th edition of Lewin on Trusts. We note that the 20th edition continues to cast doubts as the relevance of the trustees' intentions when conducting an enquiry into whether a trust is a sham. While the editors acknowledge that the unilateral view has not held favour with the courts, they continue to include the following:

> "We suggest that the requirement that the trustees must share the intent follows, not only, or perhaps not so much, from any separate legal principle, as from the need to establish the settlor's shamming intention."[62]

The aim of this article has been to further propel the idea that there is not a solid theoretical basis for considering the trustees' 'shamming intentions'. Such a position is only compounded by the fact that the basis of 'sham' is and should be to ascertain the true transaction that occurred, not to focus on questions of dishonesty and an intention to mislead. Rather, the true transaction in the context of a declaration of or settlement on trust depends on the settlors' objective intentions. Such a position not only avoids the far-reaching implications that could follow from 'secret' shamming intentions as noted in *Esteem*, but also affirms a strong partition between transfers of title and the creation of equitable interests, which are undoubtedly two different things. We leave the reader with the neat formulation by HHJ Matthews in *Taylor v Savik* of what a sham constitutes:

> "A 'sham' in English law consists in the combination of two separate things, both of which must occur. First, a (genuine) transaction happens, whether by words or acts. Or sometimes indeed *nothing* happens. Second, *a different* transaction from the first (or, if nothing happened, then something different from nothing) is *said* or at least *implied* to have taken place."[63]

The neatness of such a formulation is that it encapsulates that the sham enquiry is a universal task, but that task will materialise differently in the context of contracts and trusts. In a contract, the true transaction can, of course, depend on the intentions of all parties, and thus sham may well be bilateral. As the authors have argued in the context of trusts, however, the true transaction hinges on the objective intentions of the settlor (as this is what constitutes a trust). Once the true transaction is established, the shamming document or act falls away, and in doing so, there is no need to consider either the trustee's intentions or musings of dishonesty (which can be discarded regardless of whose intentions are relevant).

[62] *Lewin on Trusts, 20th Edition, at* 5-023 footnote 109. [63] [2024] EWCC 7 at [95]

[63] [2024] EWCC 7 at [95]