



The Family Division's approach to Sham Trusts

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The Family Division's approach to Sham Trusts (1)

Introductory Principles:

- Diplock L.J. in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, at 802: a sham 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.”



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- *Snook (con.)*: To be a sham, all parties to it “*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*”, per Diplock L.J. (ibid).
- *Hitch and others v Stone (Inspector of Taxes)* [2001] EWCA Civ 63 – Arden LJ’s ‘five points of identification’.



The Family Division's approach to Sham Trusts (1)

- Reckless indifference would be taken to constitute the necessary intention: *Minwalla v Minwalla and others* [2004] EWHC 2823 (Fam).
- In principle, a trust which was not initially a sham could not subsequently become a sham: *Shalson v Russo* [2003] EWHC 1637 (Ch) at para [190].



The Family Division's approach to Sham Trusts (2)

Examples in the Family Division and elsewhere:

- *ND v SD and Others (Financial Remedies: Trust: Beneficial Ownership)* [2018] 1 FLR 1489, Roberts J. – The 'ABC trust'
- *A v A* [2007] 2 FLR 467, per Munby J. – note Munby J's comments about the 'intellectual discipline' of pleadings.
- *M and L Trusts, Re; Nearco Trustee Co (Jersey) Ltd v AM* (2003) 5 ITELR 656 (Jersey Royal Court)



Judicious 'encouragement' (1)

The use of judicious encouragement:

- Section 25 (2)(a) MCA 1973 – The Court is to have regard to the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future.
- *Howard v Howard* [1945] 1 All ER 91 – inappropriate to force trustees to make provision for a discretionary beneficiary merely to discharge a Family Court order.



Judicious ‘encouragement’ (1)

- But: *Thomas v Thomas* [1995] 2 FLR 668, per Waite L.J. at 670: “*The availability of unidentified resources may... be inferred from a spouse's expenditure or style of living...*”
- And ... “*Where a spouse enjoys access to wealth but no absolute entitlement to it ... there will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties.*”
- See also: *Charman v Charman (No 4)* [2007] 1 FLR 1246



Judicious ‘encouragement’ - observations for the future (2)



- Post Pugachev?
- A return to the: “*Red rag to a bull*” and “*skulduggery is instantly presumed*” line of thinking? c.f. Coleridge in *J v V (Disclosure: Offshore Corporations)* [2003] EWHC 3110 (Fam)?
- Or maybe not?: *Daga v Bangur* [2018] EWFC 91 per Holman J.



Tactics and tips for Trustees (1)

Avoiding submitting to the jurisdiction:

- Being joined as a party in England and Wales does not give rise to automatic submission to jurisdiction.
- Seek directions from Home Court / follow those directions.
- If no submission to jurisdiction, H or W will have enforcement issues.



Tactics and tips for Trustees (2)



Or try settling away from the Court:

- Early Neutral Evaluation
- ‘Private’ FDRs (Financial Dispute Resolution Hearings)
- Caption Credit: @MandyinListing