



Beyond Common Intention: Aligning the Sham Trust Analysis with Equity's Maxims

Grant F. Swedak

Presented By Kimberly Whaley

WEL Partners

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Introduction

We are in an unprecedented era of sophisticated financial fraud.¹ The unscrupulous are positioned to exploit opaque financial structures like never before. Although efforts to conceal assets from authorities, creditors, and courts are hardly a novelty, the emergence of accessible multinational financial instruments has greatly enhanced financial deception without adequate safeguard to prevent such schemes. Within the past few decades, the trust structure has featured in this complex interconnected web of fraud. Historically, a revered instrument of legitimate estate planning, today certain trust structures are coopted for the purposes of tax evasion, money laundering, and asset concealment. As “sham trusts” proliferate borders, global organizations, lawmakers, regulators, and practitioners are challenged in efforts to restore the integrity of one of equity’s oldest tools.

One means of restoring integrity to trusts focuses on exposing whether purported trusts are genuine; or, merely an artifice intended to give the appearance of creating legal rights and obligations that are different from those intended by the parties. The sham trust analysis involves a judicial inquiry brought by a party challenging the validity of the trust. Where a trust is found to be a sham, it is declared *void ab initio* by the Court. The leading definition of a “sham” comes from the English case *Snook v. London & West Riding Investments Ltd.*, 1967.² The definition of a sham in *Snook* is described as,

acts done or documents executed intended to give 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.³

This definition, despite its origin in a contractual context, has become the foundation of the modern sham trust analysis, despite, trusts having developed within the law of Equity. As such, its roots outside the equitable trust tradition have left the doctrine conceptually misaligned with core equitable principles. This is because, as this paper will go on to argue, the judicial inquiry continues to hinge on whether there existed a common intention

¹ Department of Finance (Canada), “*Minister Champagne takes aim at financial scams and abuse, announces Anti-Fraud Strategy and new Financial Crimes Agency*” (20 Oct 2025) Government of Canada News Release, online: <<https://www.canada.ca/en/department-finance/news/2025/10/combating-financial-fraud-protecting-canadians-against-scams-and-abuse.html>>; Simon Tuck, “Financial crimes, including money laundering and terror financing, setting new records: FINTRAC” (30 Oct 2025) *National Post*, online: <<https://unpublished.ca/news-feed-item/2025-10-30/financial-crimes-including-money-laundering-and-terror-financing-setting>>

² *Snook v London & West Riding Investment Ltd* [1967] 2 QB 786 (CA). (“**Snook**”)

³ *Ibid.*, at pp 528.

to deceive as shared between the relevant parties.⁴ By tethering the sham trust analysis to a requirement derived from the common law context, without adequately adapting it to the equitable trust context, courts have created both a standard that shields sophisticated actors and an analysis that is inconsistent with Equity’s overarching maxims.

In addition to this tension between the sham trust analysis and Equity, this paper will also focus on the shared intention of dishonesty within the sham trust analysis. Such has become increasingly difficult to apply in the modern era of professional trustees, offshore structuring, and multi-layered transactions. Paradoxically, because of its common law roots, transposing the sham doctrine into equity has imputed a higher evidentiary burden to claimants seeking to invalidate a fraudulent trust than that required if equitable grounds alone were applied. Thus, finding utility in the concept of sham generally, we advocate that the sham trust analysis ought to receive an equitable update; otherwise, it runs the risk of falling to the wayside in favour of less onerous disqualifying causes of action.

We propose that a reformed sham trust analysis should follow in the footsteps of the Canadian Jurisprudence, which for all intents-and-purposes, has expanded the analysis beyond the common intention to deceive. In this sense, the Canadian sham trust analysis has become more equitable in its application as it prioritizes the substance of the transaction over form. We contend that the disqualifying grounds of the sham trust analysis should be widened to account for a unilateral intention to deceive and a violation of *donner et retenir ne vaut* (roughly translated to, to give and then retain is of no effect).

Structure

To effectively accomplish this endeavor, this paper will proceed with the following six-part structure: Part I will trace the historical emergence of the sham trust doctrine, highlighting the leading authorities and origins of the conceptual framework that endures today. Part II will examine the common law’s insistence on a *common intention to deceive*, setting up the central point of tension addressed in later sections. Part III will turn to the distinction between unilateral and bilateral intention, while incorporating Part III(a) to examine *Re Esteem* as a pivotal illustration of how courts have treated unilateral intention arguments. Part IV will consider the re-emergence of this debate within Canadian jurisprudence and its practical implications. Building on this foundation, Part V advances the paper’s thesis: that sham trust analysis must be reoriented. Subsections V(a) and V(b) argue that the common intention requirement both insulates sophisticated wrongdoers, and undermines equity’s core maxims. Part VI concludes by synthesizing these arguments and proposing a more equitable approach to sham trust doctrine.

⁴ In *Snook* Diplock LJ goes on to state that, “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”. In the context of the sham trust analysis, this is aimed toward the settlor and trustee.

I. Historical Emergence of Sham Trusts

The legal concept of a “sham trust” is rooted in the broader doctrine of “sham” transactions, which can trace its modern judicial origin to the English case of *Snook*. Notably, however one of the earliest sham cases dates to the late 19th century.⁵ Amongst Common Law jurisdictions, the sham principle has been applied when assessing trust-like property arrangements, and whether they are being used as a vehicle of deception.

The term sham trust, came into international use after the Royal Court of Jersey decision of *Rahman v Chase Bank (CI) Trust Co Ltd*.⁶ The term succinctly describes an arrangement that bears the outward form of a valid legal and equitable relationship yet, is one that serves to defraud creditors or conceal assets. This is evident upon examination of the caselaw and legal analyses, which demonstrate that a finding of a sham by the courts renders the trust *void ab initio*.⁷ Thus, while the term sham trust is efficient in conveying a complex idea succinctly, it obfuscates the legal reality of the relationship since no trust can be said to have ever existed.

Following the proliferation of the sham doctrine in *Snook*, and its subsequent adaption to the trust context in *Rahman*, the next notable sham trust analysis is found in *Re Esteem Settlement*.⁸ While there are several high-profile appellate decisions that intercede *Rahman* and *Re Esteem*,⁹ the Royal Court of Jersey in *Re Esteem* succeeds where the other cases fall short for two reasons: First, *Re Esteem* provides an excellent review of the preceding sham caselaw. Second, *Re Esteem* actively develops the jurisprudence concerning sham trusts, being one of the first cases to consider whether the intention requirement can be satisfied unilaterally.¹⁰

⁵ As cited within *Snook*, see *Yorkshire Railway Wagon Company v Maclure* [1882] LR 21 Ch D 309; Jeremy Kosky, Maxine Mossman & Nicole Buncher, “Sham Trusts and Reserved Powers” in Steven Kempster, Morven McMillan & Alison Meek (eds), *International Trust Disputes*, 2nd ed (Oxford: Oxford University Press, 2020) ch 4 at 67.

⁶ BoHao (Steven) Li, “There Is No Such Thing as a Sham Trust” (2013) 44 *Victoria University of Wellington Law Review* 115, at 115 footnote 2, DOI:10.26686/vuwlr.v44i1.5007; *Rahman v Chase Bank (CI) Trust Co Ltd*, [1991] JLR 103. (“**Rahman**”)

⁷ See JE Penner *the Law of Trusts* (6th ed, Oxford University Press, Oxford, 2008) at 100; Phillip Pettit *Equity and The Law of Trusts* (Butterworths, London, 1993) at 50; Paolo Panico *International Trust Law* (Oxford University Press, Oxford, 2010) at 34; and Nicky Richardson “Sham Transactions” (2011) 7 *New Zealand Family Law Journal* 70.

⁸ *Re Esteem Settlement* [2003] JLR 188. (“**Re Esteem**”) - While there are obviously notable cases that intercede in the decade between *Rahman* and *Re Esteem*, such as *National Westminster Bank v Jones*, [2001] 1 BCLC 98, this tracing of the historical emergence is not meant to be comprehensive but is rather designed to discuss notable and significant development.

⁹ See *Sharrment Pty Ltd v Official Trustee* (1982) 82 ALR 530 (Aust), at 530. (“**Sharrment**”) - Here the Federal Court of Australia approved *Snook*; and *Hitch v Stone*, [2001] STC 214 at 229, where the English Court of Appeal considered *Sharrment* and *Snook* in a sham analysis.

¹⁰ *Supra*, Note 8, at para 47.

The use of unilateral and bilateral terminology refers to intention as used in *Re Esteem* and adopted within. Bilateral intention is equated with the common intention requirement, whereas unilateral intention's sole focus is on the settlor's intention at the time of creation of the impugned trust. The delineation here is important because, the court, while conducting analyses within the sham trust context, have gone on to apply these terms as a means of categorizing trust structures.¹¹

In *Re Esteem*, when considering whether unilateral intention could be sufficient for a finding of a sham, the court followed the classic formulation as articulated by Diplock L.J., in *Snook*. The court clarified that a sham trust only arises where there exists a common intention between the settlor and trustees that the trust documents should not have their ostensible legal effect.¹² The Court thereby rejected an expanded definition of "sham" that could conflate it with situations of undue influence, lack of independence, or poor administration.

II. The Common Intention to Deceive

The judiciary has long held that sham trusts are necessarily predicated upon a shared dishonest intention between the settlor and trustee.¹³ Although jurists and academics alike have, considered the finer points within the common intention requirement, they however have more-or-less always operated within the common intention paradigm. For example, in *Midland Bank plc v Wyatt*,¹⁴ the court considered the requisite degree of shared intent. Additionally, in *Chase Manhattan v Goodman*,¹⁵ the court found it was unnecessary for the parties to have intended any specific transaction, once it was established that the apparent transaction was merely a pretence. The requirement of the common intention to deceive had been so non-contentious within the sham trust analysis that scholars had referred to it as "settled law".¹⁶ And this is for good reason since for

¹¹ See *Official Assignee v Wilson* [2007] NZCA 122, [2008] 3 NZLR 45, in which the Justices apply bilateral to trusts where the settlor and trustee are separate and distinct entities, whereas unilateral is applied to trusts where the settlor and trust are one in the same. ("**Official Assignee v Wilson**"); see also BoHao (Steven) Li, "There Is No Such Thing as a Sham Trust" (2013) 44 *Victoria University of Wellington Law Review* 115, at 119, DOI:10.26686/vuwlr.v44i1.5007

¹² *Supra*, Note 8, at para 53.

¹³ *Supra*, Note 8, at para 54.

¹⁴ *Midland Bank plc v Wyatt*, [1997] 1 BCLC 242; Jeremy Kosky, Maxine Mossman & Nicole Buncher, "Sham Trusts and Reserved Powers" in Steven Kempster, Morven McMillan & Alison Meek (eds), *International Trust Disputes*, 2nd ed (Oxford: Oxford University Press, 2020) ch 4 at pp 69.

¹⁵ *Manhattan v Goodman*, [1991] BCLC 897, at para 922; Jeremy Kosky, Maxine Mossman & Nicole Buncher, "Sham Trusts and Reserved Powers" in Steven Kempster, Morven McMillan & Alison Meek (eds), *International Trust Disputes*, 2nd ed (Oxford: Oxford University Press, 2020) ch 4 at pp 67.

¹⁶ Thomas Arnull, "Sham trusts and the requirement that a shamming intent be shared: *Administrators of the Estate of Hanson v O'Leary and Ors*" (2022) 28 *Trusts & Trustees* 405 at 406, DOI:10.1093/tandt/ttac034, Pages 405–412, at pp. 406. <<https://doi.org/10.1093/tandt/ttac034>>

decades the common intention to deceive has been viewed as *the* essential component for rendering sham trusts void.

Reference to the common intention to deceive as a requirement is riddled throughout the sham trust caselaw. Beginning with Diplock L.J., in *Snook*, in referring to sham transactions, he stated,

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 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. One thing I think, however, 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.¹⁷

This definition was subsequently relied upon by the Australia Federal Court of Appeal in, *Sharrment*, where it was held:

In determining whether the transactions were 'shams' it was necessary to ascertain what were the genuine intentions of the parties to the transactions. For acts or documents to be a 'sham' the parties must intend that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.¹⁸

The English Court of Appeal in the case of, *Hitch v. Stone* held:

...66 Second, as the passage from *Snook* makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.

[...]

69 Fifth, the intention must be a common intention (see *Snook*) . . .¹⁹

¹⁷ *Supra*, Note 2, at 802.

¹⁸ *Supra*, Note 9, at 530.

¹⁹ *Hitch v. Stone*, [2001] STC 214 at 229. ("**Hitch v Stone**")

And of course, in *Re Esteem*, the Court followed this case law in order to find:

In our judgment, in order for a trust deed to be a sham, both the settlor and the trustee must intend that the true arrangement is otherwise than as set out in the trust deed.²⁰

These excerpts illustrate that the requirement of a common intention to deceive is not merely a recurring feature of sham trust analysis, rather, it is a central determinative factor upon which the analysis relies.

From Diplock LJ's formulation in *Snook* through to *Re Esteem*, courts across jurisdictional boundaries have repeatedly emphasized that there must be a shared intention of dishonesty. This framework has provided a useful tool for courts seeking to distinguish between genuine legal arrangements as opposed to those which are effectively a façade. At the same time, while the common intention requirement is widely cited and forms a coherent doctrinal thread, it is not without conceptual and practical limitations.

The strict reliance on this factor makes the analysis difficult to apply to trusts where evidence of intention may be ambiguous. Trusts are often structured in ways that may be misleading or abusive, without clearly satisfying the common intention test. In this sense, while the principle has been critical and is deeply embedded in the jurisprudence, it may not capture all situations in which a trust is effectively a sham. Bearing in mind Diplock LJ's definition of a sham is concerned with acts, documents, or conduct which give rise to the appearance of valid legal relations, we suggest the doctrine is not fully comprehensive.

III. Unilateral vs Bilateral Intention

Within the sham trust jurisprudence, is a line of cases which consider whether the intention to deceive may be formed according to a unilateral, as opposed to a bilateral or common, intention.²¹ The argument for unilateral intention, is largely premised on the claim that trusts are unilaterally constituted structures. Consequently, those seeking to alter the sham trust analysis advocate that a settlor intending to deceive third parties or the court, should be sufficient to render the trust invalid based on a sham. This notion was contemplated by Lewin, in *Lewin on Trusts*.²² As cited in *Re Esteem Settlement*:

This form of words [i.e. Diplock, L.J.'s remarks in *Snook*] carefully fashioned in the multilateral context of a refinancing operation, does not transplant easily into the

²⁰ *Supra*, Note 8, at para 53.

²¹ *Chase Manhattan Equities v. Goodman*, [1991] BCC 308; *Mallott v. Wilson*, [1903] 2 Ch. 494; (1903), 89 L.T. 522; *Rahman v. Chase Bank (C.I.) Trust Co. Ltd.*, 1991 JLR 103; see J H Lewin, *Lewin on Trusts*, 17th ed (London: Sweet & Maxwell, 2000), at 4–23.

²² J H Lewin, *Lewin on Trusts*, 17th ed (London: Sweet & Maxwell, 2000), at 4–23.

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.²³

As authority for the argument that trusts are unilaterally constituted, Lewin cites *Mallott v Wilson*.²⁴ In this case, a settlor purported to settle real estate to the designated trustee, but failed to have said trustee subscribe the deed of transfer or provide notice of the transfer.²⁵ Upon discovery by the trustee they executed a deed of disclaimer following which the settlor purported to end the settlement, despite there being no power of revocation.²⁶ Ultimately, the Court found that the trust had been validly settled, and the purported revocation was ineffective.

Further, the authors, *Underhill & Hayton*, engage in a similar analysis stating:

A trust is completely constituted either: (a) by the settlor declaring that certain property vested in him is to be held henceforth by him on certain trusts; or (b) by the settlor effectively transferring certain property to trustees and declaring the trusts upon which the trustees are to hold such property.²⁷

In the Jersey case of *Rahman*, the court examined whether a purported trust was valid by analyzing the settlor's retention of control and the trustee's lack of independent discretion.²⁸ Ultimately, the court found that the trust was a sham because the settlor never genuinely relinquished dominion over the assets.

But the significance of *Rahman* should be understated. Until this point, the modern sham trust analysis since *Snook* focused on the common intention to deceive as being the requisite consideration and only disqualifying element. However, in *Rahman* we see that an impugned trust was declared a sham, and declared *void ab initio*, on the basis that the settlor never genuinely relinquished control over the assets. While the failure to relinquish control over the assets would certainly be indicative of a sham trust and a common intention to deceive, the presence of this factor alone would not, by itself, be conclusive of a common intention, but rather a unilateral one. Moreover, for a settlor to pronounce that a trust has been validly constituted while retaining control over the subject matter of the trust, would violate the equitable structure and principles necessary for valid

²³ *Ibid.*; see also *Re Esteem*, at para 47.

²⁴ *Mallott v Wilson*, [1903] 2 Ch. 494; (1903), 89 L.T. 522, at pp. 494. ("**Mallot v Wilson**")

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *David J. Hayton, Paul Matthews & Charles Mitchell, Underhill & Hayton: Law of Trusts & Trustees, 16th ed (London: Butterworths, 2003)*, at pps 144 and 245. See also *Re Esteem*, at para 49.

²⁸ *Ibid.*, at pp. 2.

constitution. Would this not also render the trust a sham? Although *Snook* was cited in argument, the court did not refer to the dicta of Diplock L.J., and instead relied on *Re Knights*,²⁹ where the Court held that it “will not readily uphold documents which are a fiction in the sense that they bear no real relation to the facts of a transaction, the terms of which they purport to embody...”³⁰

III(a). *Re Esteem’s Treatment of Unilateral Intention Arguments*

When these cases, authorities, and arguments of unilateral intention were considered before the Royal Court of Jersey in *Re Esteem*, the Court found that *Mallott v Wilson* was decided incorrectly.³¹ In particular, *Mallot* was found to be inconsistent with the classic statement in, *Milroy v. Lord*.³² *Milroy* holds that where the trustee is distinct from the settlor, there must be either a perfect transfer or a declaration of trust by the settlor; being an alternative to another, an intended transfer which fails cannot be considered a valid constitution of trust.³³

The rule in *Milroy* is a longstanding trust principle that remains relevant to this day; however, we consider its application to *Mallott v Wilson* as an insufficient means for invalidating the argument advanced by Lewin. *Mallott v Wilson* is cited by Lewin in a narrow context, merely for the proposition that trusts may be validly created without acceptance or consultation with the trustee. In *Mallott v Wilson*, the Court of Appeal found the trust to be valid and irrevocable where the settlor executed and delivered a voluntary deed transferring land unto a trustee, even though the designated trustee did not sign the deed and later declined to accept the designation. Upon the Trustee’s decline, the settlor purported to revoke the declaration of trust, despite there being no revocation power.

The court in *Re Esteem*, contends that no trust ought to have been found on the basis the settlor did not perfect the transfer.³⁴ Not only do we contend that the suggestion *Mallot* was decided incorrectly would not have the effect of invalidating Lewin’s argument, but also we would also suggest that the application of *Milroy* to *Mallot* is a narrow application of caselaw. In the early 1950s, the Court of Appeal revisited the rule in *Milroy* in the decision of *Re Rose*,³⁵ where the Court found, “the settlor, did everything which, according to the nature of the property comprised in the settlement, was necessary to be done by him in

²⁹ *Re Knights (Jersey) Ltd.*, (1962 J.J.) at 21.

³⁰ Michael Birt, “The Meaning of the Rahman Decision” (2003) 3:1 *Oxford International Trusts Review* 8, at pp 86.

³¹ *Supra*, Note 8, at para 53(h)

³² *Milroy v. Lord* (1862), 4 De G.F. & J. 264 ; 45 E.R. 1185 ; 7 L.T. 178.

³³ *Supra*, Note 8, at para 53(h)

³⁴ This must be the case as there was a clear declaration of trust at the onset.

³⁵ *Rose, Re* [1952] EWCA Civ 4. (“**Re Rose**”)

order to transfer the property”.³⁶ Such a finding was sufficient for there to be a valid constitution of a trust.

Rather than framing the rule in *Milroy* as focusing on imperfect transactions to invalidate trusts, the Appellate Court in *Re Rose* finds it more appropriate to ask whether the settlor has done everything in their power, according to the nature of the property, to vest legal interest in the property to the donee. While equity will not perfect an imperfect gift, it will also not let a trust fail for want of a trustee. In other words, in Equity the trust is already viewed as valid and will not be allowed to collapse merely because the designated trustee is unwilling, unable, unfit to act, or because no trustee was appointed at all. With these considerations in mind, one may make the argument that the Court in *Mallott v Wilson* found the settlor to have done everything within his ability to effect the transfer of his real property to the designated trustee.

Ultimately, the court in *Re Esteem* goes on to distinguish the decision of *Rahman* finding it to be focused on the principle of *donner et retenir ne vaut*.³⁷ The principle is a long-standing maxim of equity which can be translated as “to give and to retain is of no effect.” The principle holds that a transfer is not valid where the donor purports to gift the property while simultaneously attempts to retain control. Rather than considering whether the principle of *donner et retenir ne vaut* ought to have a role in the sham trust analysis, or whether such an equitable maxim could interact with the sham trust analysis, the court simply distinguishes the concept. In the end, the court in *Re Esteem* applied the principles set forth in *Snook and Hitch v Stone*, holding that, “in order for a trust deed to be a sham, both the settlor and the trustee must intend that the true arrangement is otherwise than as set out in the trust deed.”³⁸

IV. The Re-Emergence of Unilateral vs Bilateral Intention & The Canadian Jurisprudence

Since the *Snook* decision in 1967, there had been a clear trend of common law courts reaffirming the common intention to deceive. This remained the dominant paradigm up until around 2008, where the discussion of unilateral or bilateral intention re-emerged in New Zealand when the Court of Appeal considered sham trusts in, *Official Assignee v Wilson*.³⁹

³⁶ *Ibid.*, at pp 8.

³⁷ *Supra*, Note 8, at para 53(k)

³⁸ *Supra*, Note 8, at paras 53 and 54.

³⁹ *Supra*, Note 11, at [23]; Note that in *Official Assignee v Wilson*, the Court uses the terms unilateral and bilateral to categorize trusts according to whether the settlor and trustee are separate entities (bilateral trusts used where the settlor and trustee are distinct entities). However, in *obiter* the Court does consider whether the intention requirement for a sham trust was that of the settlor only or also of the trustee; see

In the years leading up to the *Official Assignee v Wilson* decision, the sham trust and its criteria for invalidation was the subject of academic debate between Jessica Palmer and Matthew Conaglen.⁴⁰ Similar to Lewin, Palmer believes that the intention requirement for the sham trust analysis should be no different from the intention requirement necessary to form a valid trust. The Court of Appeal in *Official Assignee v Wilson* rejected this argument and rather went on to follow the wide breadth of common intention caselaw as referable to *Snook*, *Re Esteem*, and *Rahman*.⁴¹

Despite the near half century of common law jurisprudence holding steadfast in its commitment to the common intention requirement, Canadian jurisprudence would ultimately diverge. When initially considering the sham doctrine, the Canadian courts followed suit and built upon the English foundations of *Snook*; however, when the doctrine was inevitably applied to the realm of trusts, Canada went on to favour Lewin's perspective. While some may contend that the Canadian experience only muddies the waters, we believe that it is evident and reflective of a further development in the sham trust analysis.

The sham doctrine was initially integrated into the Canadian jurisprudence as a means to defeat blatantly artificial tax structures.⁴² The sham doctrine remained somewhat confined to the tax context within the Canadian Federal Courts, eventually reaching the Supreme Court of Canada, in, *Stuart Investments Ltd. v R*.⁴³ *Stuart* saw the court engage in an analysis delineating the boundaries between lawful tax avoidance and illegitimate sham transactions, grounding its analysis in principles of genuine legal intention. While the court declined to apply the English "sham" doctrine expansively, Estey J., nonetheless affirmed its relevance within Canadian law, adopting Diplock LJ's classic formulation in *Snook*.

It is difficult to pinpoint where the sham trust analysis first emerged in Canadian jurisprudence, perhaps because of the use of the term, 'sham trust' as opposed to its technical legal term which carries with it the common intention to deceive analysis. There is mention of a "sham trust," in *Singer v Singer*,⁴⁴ where the court found that the impugned trust was:

BoHao (Steven) Li, "There Is No Such Thing as a Sham Trust" (2013) 44 *Victoria University of Wellington Law Review* 115, at 116, DOI:10.26686/vuwlr.v44i1.5007.

⁴⁰ Jessica Plamer, "Dealing with the Emerging Popularity of Sham Trusts" [2007] NZ L Rev 81; and Matthew Conaglen "Sham Trusts" [2008] CLJ 176.

⁴¹ BoHao (Steven) Li, "There Is No Such Thing as a Sham Trust" (2013) 44 *Victoria University of Wellington Law Review* 115, at 118, DOI:10.26686/vuwlr.v44i1.5007; Wilson, at [48], as per the joint judgement of O'Regan and Robertson JJ.

⁴² See *Susan Hosiery Ltd. v. Minister of National Revenue (No. 2)*, 1969 CarswellNat 311 [1969] 2 Ex. C.R. 408; *Campeau v. Minister of National Revenue*, 1970 CarswellNat 26 [1970] C.T.C. 306

⁴³ *Stuart Investments Ltd. v. The Queen*, 1984 CanLII 20 (SCC), [1984] 1 SCR 536. ("**Stuart**")

⁴⁴ *Singer v Singer*, 1973 CanLII 1962 (ON SC)

simply a device to defeat creditors and that in fact he would retain control, would have resignations of all the trustees in his hands at all times and would, in fact, be the manager of the whole operation at all times.⁴⁵

The common intention to deceive within the sham trust analysis is first reported in Canada in *British Columbia Milk Marketing Board v. Bari Cheese Ltd.*⁴⁶ Here, the Superior Court of British Columbia cited *Stuart* and a number of tax cases as having adopted the sham doctrine definition initially set forth in *Snook*.⁴⁷ *Bari Cheese* was cited by *Trident Foreshore Lands*,⁴⁸ and, in the *Matter of the Bankruptcy of Larry Peter Biggar*.⁴⁹ Notably, both cases rely on *Snook* and *Stuart*, and reaffirm that a sham requires a common intention between the settlor and the trustee and that the trust documents should not have the legal effect they purport to have.

While one would have expected the English and now British Columbian cases affirming the common intention to deceive, to carry through to other Canadian jurisdictions, the sham trust analysis takes an unexpected turn with *Duca Financial Services Credit Union v Bozzo*.⁵⁰ Here, in affirming a trial level decision, the Ontario Court of Appeal found the following:

..the trial judge correctly set out the requirements for a valid trust and referred to some of the circumstances in which a trust may be found to be a sham and therefore void:

To establish a valid trust, there must be three certainties: the certainty of intention, the certainty of subject matter and the certainty of objects. [Citations omitted.]

A purported trust may be held to be a “sham” and void where a trust instrument sets out the persons who are to benefit but does not represent the settler’s true intent which is simply to create the appearance of a disposition of assets through the purported trust. The actual intent, in such cases, is to retain control of the assets purportedly held in trust. In such an instance, there is no true intention to create a trust, and one of the three certainties is missing; hence, the purported trust is void... See *Waters’ Law*

⁴⁵ *Ibid.*, at pp. 375.

⁴⁶ *British Columbia Milk Marketing Board v. Bari Cheese Ltd.*, 1993 CanLII 2225 (BC SC), at para 34. (“**Bari Cheese**”)

⁴⁷ *Ibid.*, at para 34.

⁴⁸ *Trident Foreshore Lands Ltd. v. Brown et al.*, 2004 BCSC 1365 (CanLII), at para 39

⁴⁹ *In the Matter of the Bankruptcy of Larry Peter Biggar*, 2005 BCSC 1657 (CanLII), at para 26. (“**Biggar**”)

⁵⁰ *Duca Financial Services Credit Union v Bozzo*, 2011 ONCA 455 (“**Duca Financial Services**”); There is also the case of *Mordo v. Nitting et al*, 2006 BCSC 1761 (CanLII), which cites Lewin heavily at paras 295-303, but declines to declare a sham trust.

of Trusts in Canada, 3rd ed., Donovan W.M. Waters, Mark R. Gillen and Lionel D. Smith, c.5 at pp. 144-149.⁵¹

Notably absent from this analysis, which was affirmed by the Ontario Court of Appeal, is the common intention to deceive. The court instead noted that a unilateral intention to deceive held by the settlor is sufficient to violate the basic conceptual precepts necessary for valid trust creation. Further to this point, it could be argued that where it is the settlor's intention to retain ownership and control, not only does this violate the certainty of intention, but also *donner et retenir ne vaut*.

Consequently, *Duca* represents a marked departure from prior jurisprudence and the Appellate Court seemingly endorses the notion of a unilateral intention. While previous caselaw had perhaps considered unilateral intention, or made it through the court of first instance, there had yet to be a case where unilateral intention received affirmation by an Appellate Court. As a further consequence, *Duca* also endorsed a similar finding to that of *Rahman*, where the principle of *donner et retenir ne vaut* was invoked as the mechanism for voiding the sham trust. This decision stands in sharp contrast to that of *Re Esteem*, which expressly emphasized that the mere retention of influence or control by the settlor does not of itself render a trust a sham, and that there must be a shared dishonest intention between the settlor and trustee for the trust structure to be a façade designed to mislead third parties.⁵² So this begs the question, how do subsequent Canadian cases treat *Duca Financial Services*? Is it an abrogation of the law or a patently endorsed positive development?

Insofar as Ontario is concerned, the case of *McGoey (Re)*,⁵³ and subsequent caselaw confirms that the holding in *Duca Financial Services* has gone on to be treated favourably.⁵⁴ In *McGoey (Re)*, an analysis by the trial level Court found alleged trusts were shams because the settlor did not intend to divest beneficial ownership, and the trust documents themselves were proven to be falsified.⁵⁵ Relevant excerpts from the case demonstrate their endorsement of *Duca*,

[20] Whether a trust is invalid as the result of a sham depends on the intention that existed at the time that the alleged trust was made. Where the settlor did not in fact intend to part with the beneficial interest in trust property, but executed documents to that apparent effect, the trust is a sham.

⁵¹ *Ibid.*, at para 2.

⁵² *Supra*, Note 8, at paras [66]-[69].

⁵³ *McGoey (Re)*, 2019 ONSC 80 (CanLII). (“**McGoey (Re)**”)

⁵⁴ Subsequent caselaw referring to *Riedel v. Sangha*, 2025 ONSC 778 (CanLII) and *Resendes v. Maciel*, 2025 ONSC 3263 (CanLII)

⁵⁵ *Supra*, Note 53, at para 20.

[21] Where a purported trust does not represent the settlor's true intent (which is simply to create the appearance of a disposition of assets) there is no true intention to create a trust, and one of the three certainties (certainty of intention) is missing. As a result, the purported trust is void, *Duca Financial Services Credit Union Ltd v. Bozzo*, 2011 ONCA 455 at para 2.

The analysis in *McGoey (Re)* was treated favourably in subsequent decisions. For example, in *Riedel v. Sangha*,⁵⁶ the court cited both *Duca* and *McGoey* to hold that, "deceit need not be established to find that a trust is a sham and that the assessment of whether a trust is a sham turns on the intentions of the settlor at the time the trust was made".⁵⁷ In *Resendes v. Maciel*,⁵⁸ another family law matter examining whether the sham trust doctrine ought to be invoked, the court also cited *McGoey (Re)* and *Duca* with approval: "If a trust is deemed to be a sham, it will be void, meaning that it is treated as if the trust never existed, and the assets held in trust revert to the trustee."⁵⁹

Other common law Canadian jurisdictions that have seemingly dropped the common intention to deceive from the sham trust analysis such as in, *Funk v Funk*⁶⁰ from Alberta. In this case, the court cites the following passage from *Waters' Law of Trusts in Canada*:

Used in the trust law setting, now a practice in Canada as elsewhere, it describes a trust that the courts will declare void because the provisions in the trust instrument do not represent the settlor's true intent as to the terms upon which the trustee is to hold the trust asset(s). Though the trust instrument sets out the persons or purposes that are to benefit, the settlor's true intent is to retain control of the assets purportedly held in trust because the true intent, for instance, is to appear to have disposed of the assets and so to evade tax, to defeat personal creditors, or prejudice the claims of an estranged spouse or the children of the relationship...⁶¹

In the following paragraphs, the plaintiff summarizes *Waters'* position on how sham trusts may be 'attacked', or in other words, invalidated, advancing two grounds. The court goes on to agree with this characterization stating:

1. A trust may be a sham where the settlor had no intention to create the trust at all, and the settlor's true intention was to retain control of the assets held by the

⁵⁶ *Riedel v. Sangha*, 2025 ONSC 778 (CanLII). ("**Riedel v Sangha**")

⁵⁷ *Ibid.*, at paras 24-25.

⁵⁸ *Resendes v. Maciel*, 2025 ONSC 3263 (CanLII). ("**Resendes v Maciel**")

⁵⁹ *Ibid.*, at para 36.

⁶⁰ *Funk v Funk*, 2016 ABQB 189 (CanLII). ("**Funk v Funk**")

⁶¹ Donovan WM Waters, QC, Mark R Gillen & Lionel D smith, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters Canada Limited 2012) at 154-155; *Funk v Funk*, 2016 ABQB 189 (CanLII), at para 77.

trust. This may be to create the appearance that assets have been disposed of and are not available to creditors.

2. A trust may be a sham even where there was the requisite certainty of intention to create the trust if the settlor, as trustee or through a compliant trustee, acted as the absolute owner of the trust property. In this case, the trust is "illusory".⁶²

V. The Pitch – A Reformed Approach to Sham Trust Analysis

We contend that the modern Canadian jurisprudence represents an advancement that is more in tune with the fundamental principles of equity and the modern financial landscape. In the Canadian context, the common intention requirement has been more-or-less dispensed with in exchange for a unilateral intention and a focus on whether the settlor retained control and dominion over the subject matter.⁶³ This approach, which essentially lays out individuating grounds, has positioned the Canadian sham trust analysis to be a more functional and versatile tool that may be wielded by the Courts to effectively investigate and defeat fraud.

The Canadian jurisprudence when viewed in conjunction with *Rahman, Official Assignee v Wilson*, and the scholarly writings of *Lewin, Palmer, Waters, and Underhill & Hayton*, reflects the growing consensus that the common intention requirement is at odds with equitable trusts. Prior to Canadian treatment, these attempted departures from the common intention requirement were shutdown before they could pick up any judicial momentum. However, the Canadian experience now seems to have managed to escape the rigid dicta laid by Diplock LJ.

Rather than having diverging sham trust analyses, we contend that the Canadian treatment be considered as an updated approach incorporating unilateral intention and the principle of *donner et retenir ne vaut* as invalidating grounds. The common intention to deceive, while a sufficient ground to invalidate a trust based on it being a sham, should not be the necessary element. In fact, it is needlessly burdensome and as such, we advance at least, two primary grounds for dispensing with the common intention to deceive requirement.

6a. The Common Intention Requirement Creates a Protection for Sophisticated Wrongdoers

Equity can and does, by operation of law, invert the straightforward understanding of legal mechanisms to protect vulnerable classes. For example, consider the presumption of

⁶² *Supra*, Note 60, at para 80.

⁶³ See also *Syndic de Budker*, 2025 QCCS 229 (CanLII) and *Levasseur v. 9095-9206 Québec inc.*, 2012 QCCA 45. Not cited as above because these cases emerge out of the civil based jurisdiction of Quebec.

resulting trust which works to negate a presumed entitlement respecting gratuitous transfers. Equity in such circumstances operates to protect vulnerable classes; namely, elderly parents who have transferred their assets to their adult children so they may assist with *inter vivos* management. Additionally, consider the equitable doctrine of Partial Performance which displaces a statutory requirement that all contracts for land must be in writing, as a means of preventing fraud and unconscionability. In a bizarre twist of equity, the requirement of a common intention to deceive arguably creates a protection for sophisticated wrongdoers. This protection is created indirectly since the common intention to deceive places an inexplicable higher standard on the claimant seeking to invalidate a trust based on sham principles, than it would in seeking to invalidate a trust for lack of certainty of intention. Rather than focusing solely on the settlor's intention at the time of creation, which we contend ought to be at the core of the analysis, the claimant is required to also prove there was a shared intention amongst the trustee(s) to mislead third parties or the court.

The case of *Re Rose*, the certainty of intention analysis, and the equitable maxim that a trust ought not to fail for want of trustee, all suggest there is no inquiry into the trustee's intention or acceptance of the transfer. The sham trust analysis therefore stands in sharp contrast to equity's usual approach, which typically abides by the maxim that equity presumes against a fraud. Where equity usually operates to flip the script, like in the presumption of resulting trust where it places the burden on the alleged wrongdoer to prove intention, here we see a more common-law-esque approach where the claimant is responsible for satisfying the onus.

Sophisticated wrongdoers, those with means, expertise, and agency, are uniquely positioned to exploit the doctrinal rigidity of the sham trust analysis. By structuring transactions through nominal trustees or professional intermediaries, often with no shared intention beyond formal compliance, they can insulate themselves from a finding of deceit. In *Antle v. Canada*,⁶⁴ for instance, the Federal Court of Appeal declined to find a sham trust despite clear evidence that the settlor never relinquished control, citing the absence of a shared fraudulent intent.⁶⁵ Notwithstanding, the trust was ultimately invalidated for the lack of certainties.⁶⁶ The result was the validation—at least in form—of a transaction that equity would otherwise condemn under the maxim *donner et retenir ne vaut*. In this way, the sham doctrine, while intended to pierce veils of deception and fraud, instead, paradoxically affords protection to those sophisticated enough to preserve plausible

⁶⁴ *Antle v. The Queen*, 2009 TCC 465 (CanLII), as aff'd by *Antle v. Canada*, 2010 FCA 280 (CanLII). (“Antle”)

⁶⁵ *Ibid.*, at para 6.

⁶⁶ *Ibid.*

deniability. This outcome stands in marked tension with equity's broader purpose: to prevent the use of legal formality as an instrument of fraud.

Taken together, these observations reveal a fundamental incongruity in the sham trust doctrine. While it purports to safeguard against abusive or illusory arrangements, its reliance on a shared intent to deceive, shifts the focus from the substance of the transaction. The very actors whom equity would typically scrutinize, those with sophistication, resources, and access to legal counsel, are better able to navigate its constraints. The classic sham trust analysis supported by *Antle*, is ill-equipped to address arrangements that, in practice, replicate the effects of ownership without genuine divestment. This tension highlights a broader doctrinal inconsistency within equity: the principles that underlie equitable trusts, including the requirement of actual divestment embodied in *donner et retenir ne vaut*, are at odds with the thresholds found in the sham trust analysis. Recognizing this inconsistency is critical to understanding both the limits of the sham trust doctrine, and the ongoing challenges of aligning equitable remedies with the substantive realities they are meant to govern.

6b. The Common Intention Requirement is Inconsistent with Equity's Maxims

Equitable doctrines and trust structures themselves are premised upon the principles and maxims of equity. We have argued that the sham doctrine, since its import from the common law contract context, has received little-to-no adaptation in the broader equitable context. This is evident not only in the application of the sham trust analysis, but also true insofar as the constituent components of it. There is a notable absence of the theoretical underpinnings of trust constitution incorporating equity into the sham doctrine. Some of the relevant maxims for inclusion, absent in the analysis:

- i. Equity presumes against fraud;
- ii. Equity looks to the intent, not the words;
- iii. Equity will not perfect an imperfect gift;
- iv. Equity looks to the intent rather than the form;
- v. Equity will not assist a party in achieving the fruits of deception;
- vi. Equity aids the performance of obligations.

Insofar as the application of the sham trust analysis is concerned, the rigid adherence to the common intention element is contrary to the central premise of equity, which looks to provide flexible and substantive relief to injured parties where adherence to common law doctrines falls short. Historically, the application of the sham trust analysis has been more akin to common law doctrines than to equitable doctrines. Yet, equity emerged from the Court of Chancery as a response to the rigidity and procedural formalism of the common

law.⁶⁷ It is our position, that the classic sham trust analysis produces deficiencies by following such rigid formalism, and would benefit from equitable consideration.

Historically equitable doctrines have adjusted to better account for equity’s flexibility. For example, the imposition of constructive trusts was once more narrowly applied to fiduciary or proprietary matters, but has since evolved into a remedial instrument that may be imposed, “wherever good conscience so requires.”⁶⁸ The Supreme Court of Canada since *Soulos*, and subsequently, in *Moore v Sweet*,⁶⁹ have gone on to affirm that, “equity will intervene wherever fairness so dictates”.⁷⁰ As such, it makes sense that adjacent common law jurisdictions consider amending their sham trust analysis to better align with equity’s purposes.

Those who wish to retain the common intention element often argue that removing it would collapse the distinction between a sham trust and an invalid trust. When a trust is found to be void *ab initio*, as is the case where it is declared to be a sham, it is treated as if it never existed; the property is not held in trust and typically reverts to the settlor or their estate. A trust may also be deemed void where one of the three certainties is missing (such as genuine intention); or, where the settlor is found to have never relinquished control thereby violating the principle of *donner et retenir ne vaut*. Arguably, by amalgamating unilateral intention, with the principle of *donner et retenir ne vaut*, in a sham trust analysis would fulfil equity’s overriding purpose to examine substance over form. The way in which the trust is found to be *void ab initio*, whether by unilateral or common intention, or by violating *donner et retenir ne vaut*, potentially serve as *indicia* that a trust was designed for a non-lawful purpose. The rigid adherence to the *Snook*-based requirement of a common intention to deceive represents a conceptually inconsistent, constraint.

Concluding Comments

Examination of the sham trust doctrine reveals a tension between the inherited rigidity of the common law and the flexible, conscience-driven foundations of equity. By tethering the analysis to the common intention to deceive, courts have preserved a framework ill-

⁶⁷ *Snell’s Equity*, 34th ed (London: Sweet & Maxwell, 2020) at para 1-001; Donovan WM Waters, Mark R Gillen & Lionel D Smith, *Waters’ Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters, 2021) at §1. I.

The early purpose of equity was to provide substantive relief against the harshness of common law doctrines; as such, equitable doctrines intervene where common law remedies were inadequate, where formal legal ownership failed to reflect the parties’ true intentions, leading to doctrines such as trusts, equitable estoppel, and fiduciary obligations, or where strict application of legal rights would produce unconscionable outcomes.

⁶⁸ *Soulos v. Korkontzilas*, 1997 CanLII 346 (SCC), [1997] 2 SCR 217.

⁶⁹ *Moore v. Sweet*, 2018 SCC 52 (CanLII), [2018] 3 SCR 303.

⁷⁰ *Ibid.*

suited to the modern trust landscape. The Canadian jurisprudence demonstrates a gradual but significant departure from this orthodoxy, emphasizing instead the settlor's unilateral intention and the equitable principle of *donner et retenir ne vaut*. This shift does not dilute the sham doctrine but brings back its equitable purposes: to ensure substance over form prevails and that control and ownership not be permitted to coexist in disguise.

A sham trust ought to be found wherever there is a violation of the conventional precepts required for valid creation. By expanding the sham trust doctrine to include invalidating grounds, Canadian Courts have brought the doctrine into harmony with equity's foundational maxims. The goal in the end after all is to prevent fraudulent use of legal instruments.

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