The topic of Sham Trusts continues to be, understandably, of interest to estate planners and trustees. The concept of “sham” is not without its own problems but its application can also often be difficult. The legal concept, and its application, was for many years fixed and predictable, but in more recent times, at least in Australian jurisprudence, it has developed a flexibility which may create for trustees, and their advisers, additional needs for caution and care. The concept in the United States, at least in the tax context, had long been applied more broadly than it had in the U.K. and Australia, but its recent use in the *Credit Suisse* litigation\(^1\) may well mark a watershed with profound international significance.

The orthodox view of sham under U.K. law was simply that something was a sham if the parties to it actually intended the thing to be a sham. In other words that there could be no sham if the parties intended the thing impugned to have the legal effect it purported to have. That was not always so under U.S. law and may now not be so under Australian law. In other words, something may be found to be a sham even when the parties to it intended it to have its legal effect. That is significant for trustees and their advisers who cannot be satisfied that what they have done, or advised upon, is not a sham just because the legal consequences created were intended by the parties. With that in mind it might be useful to deal with the topic in blocks of what may seem like basic principles but which I hope may not be too simplistic.

**What is a Sham?**

The question “What is a Sham?” does not have a simple answer. Its ordinary meaning is “trick, hoax, fraud, imposture; something devised to impose upon, delude or disappoint expectation”.\(^2\) The legal meaning of the word “sham”, however, is not the same as its general meaning. In *Equus Corp Pty Ltd v Glengallan Investments Pty*
it was said in a joint judgment in the High Court that a trial judge had been wrong to characterise a transaction as a sham by applying the ordinary meaning of the word:

The primary judge was wrong to characterise [the transactions], as he did by his references to “artifice”, “façade” and “charade”, as shams. “Sham” is an expression which has a well-understood legal meaning.

Their Honours went on to say about that well-understood legal meaning:

It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences.

That particular legal meaning has a number of elements which distinguish it from the ordinary meaning of sham found in common usage. First, it relates specifically to something which purports to have a legal meaning and effect, such as a contract, trust, resolution, conveyance, transfer, lease, mortgage, sale, multi-partied transaction or unilateral action which would, if genuine, ordinarily have legal effect. It is, in other words, essential to a sham that what is deliberately created as the pretence is something which can and purports to have legal consequences. Secondly, it is essential to the finding of a sham that the parties intended that what is created does not have its purported legal effect.

Critical to that element of the legal meaning of “sham” is that the parties creating the artifice actually intended to create something as a sham or artifice and actually intended that it not have the legal consequences it would appear to have. The intention being referred to in this context is the actual or subjective intention of the parties rather than one presumed or imposed by law upon objective facts whatever might have been the actual intention of the parties. It is not like an intention which the law may objectively presume parties to have when they enter a contract: in the case of shams the law is concerned with what intentions the parties actually had. It may be useful in this context to note that the intention needed for there to be a sham is different from the circumstances in which the law might impose a constructive trust. There can be no sham trust where a constructive trust arises, just as there can be

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4 Ibid, 486.
5 Ibid [citation omitted].
no sham contract where the law finds a contract to have been intended on the objective theory of contract.

The Shamming Intention and the Sham

Whether a sham was intended is a question of fact to be determined on the relevant evidence. In *Snook v London and West Riding Investments Ltd* Diplock LJ said in a frequently cited passage:

> [Sham] means acts done or documents executed by the parties […] 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.

The inquiry into the actual intention of the parties whose intention is relevant to create the legal effect of something which is said to be a sham is an inquiry into the actual intention which the relevant parties actually had. What evidence will be relevant to such an inquiry will depend upon a precise identification (a) of the subject matter said to be the sham and (b) of those whose intention is relevant to determine whether the “thing” said to be a sham has its legal effect or not. Some “things”, for example, like a unilateral declaration of trust, or a gift, require the intention of only one person to have legal effect. In such cases it will be the intention of that one person that will determine whether that thing is a sham. Other things, however, have legal effect where more than one person intends to create something with legal effect. In such cases it will be necessary for all persons to have the shamming intention and the thing may have legal effect where one or more, but not all, persons to that thing had an intention to create a sham. Where, for example, a contract is made between two parties its legal effect will depend upon the objective intention of the parties.

One party’s intention might conceivably not be to create the legal relations the contract appears to create, but it may not be a sham if the other party’s intention was not to create a sham. An application of the objective theory of contract may result in a contract being found to be legally effective, that is, that the parties will be found to have intended to have created legal relations, even though one or more of those parties

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7 [1967] 2 QB 786.
8 Ibid, 802.
9 *Yorkshire Railway Wagon Co v Maclure* (1882) LR 21 Ch D 309, 314; *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802.
may have intended that the legal relations not be created. For the contract to be a sham all of the parties would need to have the common intention that the contract was not to have the effect it would otherwise appear to have. A unilateral resolution, however, may be a sham if the person making the resolution did so with an intention that the resolution not have the effect it would purport to have.

The position of trusts may be more complicated\(^\text{10}\) and will depend upon the subject matter in question. A declaration of trust may be unilateral but typically involves a trustee as well as a settlor. There may be complicated questions about whether a sham can be established where a trustee assumed trust obligations upon a settlement intended by the settlor to be a sham. The acts of corporate trustees also give rise to complex factual inquiries about whose intention is relevant and sufficient to determine whether the act of a corporate trustee is a sham. However, questions about intention should not be confused with inquiries about whether an implied or constructive trust has arisen in the face of the actual intention of those concerned.

**Evidence of the Shamming Intention**

There may also be a difficulty in obtaining the evidence about whether the relevant parties had an intention to create a sham. The shamming intention must, of course, be found in whatever intention is necessary to create the legal effect of that which is said to be the sham. Proof about a person’s subjective intention may at times be self-serving. In *Commissioner of Stamp Duties (Queensland) v Jolliffe*,\(^\text{11}\) recently disapproved,\(^\text{12}\) a person who had made a declaration of trust in favour of his wife successfully contended that it was a sham. More often, however, the party alleged to have created a sham will contend that the legal effect of what was created is what had been intended. That may often be the case where the question of sham arises in the context of tax disputes; as it was in the case of *Raftland Pty Ltd v Federal Commissioner of Taxation*\(^\text{13}\) and the U.S case of *Gregory v Helvering*.\(^\text{14}\) A practical difficulty in determining whether something was intended to be a sham will often be that the evidence of the shammer is to assert the sham to have been genuine. The very

\(^{10}\) See Matthew Conaglen “Trusts and Intention” in E Simpson & M Stewart (eds), *Sham Transactions* (Oxford University Press, 2013), 131-140.

\(^{11}\) (1920) 28 CLR 178.

\(^{12}\) *Byrnes v Kendle* (2011) 243 CLR 253.

\(^{13}\) (2008) 238 CLR 516.

\(^{14}\) 293 U.S. 465 (1935)
nature of a sham is that something was intended by its creators to have the appearance of creating the legal effect it purports to have and the evidence of those involved is likely to be, consistently with their intention to maintain a pretence, that the pretence was not a pretence at all.

A critical question which arises in this context is the extent to which the subjective, or actual, intention of the individuals concerned can be based upon objective circumstances which conflicts with oral testimony of an actual intention to create the legal rights purportedly created. An aspect of that question is whether the finding of a shamming intention may be made upon the balance of objective evidence some of which may support a finding of sham and some of which may not. In the tax context, for example, it may sometimes be the case that an actual intention to create legal relations existed (and therefore pointing against a finding of sham), but that the overall, economic, business or financial outcome achieved (and intended) is inconsistent with those legal rights (and therefore supporting a finding of sham).

**Subjective Intention based upon Objective Facts**

In some cases the actual intention of the parties may be found to be a sham even though there is evidence of an actual subjective intention that the impugned transaction was to have the effect that it purported to have. *Raftland Pty Ltd v Federal Commissioner of Taxation*\(^{15}\) concerned the finding that a resolution by a trustee (Raftland) to distribute money to another trust (the E & M Unit Trust) was a sham notwithstanding (a) that the parties needed (and therefore might be presumed to have actually intended) the resolution to have its legal effect if the ultimate taxation consequences were to be achieved, and (b) that the parties took steps to secure control of the E & M Unit Trust after the resolution (a step that was necessary to avoid the commercial consequences which could only arise if the resolution did have the legal effect it purported to have).

The facts of *Raftland* are complicated but they essentially involved the distribution of profits from a profitable entity to one which had potentially deductible carried forward losses incurred from prior years. The profitable entity had been connected with members of the Heran family and the loss entity with Mr and Mrs Thomasz.

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\(^{15}\) (2008) 238 CLR 516.
The Herans and the Thomaszs had not previously been connected in business or in any other dealings, but the Herans had profits which would otherwise be taxable and Mr and Mrs Thomasz had a trust available with carried forward losses against which the Herans’ profits might be off-set to reduce the tax payable. An essential step in the distribution of the profits from one group to the other group was a resolution by a trustee connected with the Herans to distribute income to a trust connected with Mr and Mrs Thomasz. The resolution by Raftland to distribute income to the E & M Unit Trust, however, would, if effective, have given Mr and Mrs Thomasz control over the moneys distributed to the trust and the Heran family would have lost control over that money. Another step in the transaction, therefore, was for the Heran family to secure control of the E & M Unit Trust upon the assumption, of course, that the resolution was otherwise legally effective according to its terms. There were, in other words, two evidentiary matters which gave support to the argument that the resolution by the trustee was not a sham. The first was the need for the resolution to be legally effective if the desired tax outcome was to be achieved. The second was the change of the people who controlled the trust in whose favour the resolution had been made; a change that would not have been necessary if the resolution had not been legally effective according to its terms. The trial judge, however, found the resolution to have been a sham. The High Court in Raftland upheld the finding of the trial judge that the trustee’s resolution was a sham notwithstanding that the relevant shammer (namely, the trustee) needed to have a legally effective transaction to achieve the tax objectives which the resolution purported to create, and that the subsequent change of control of the trust had occurred upon the assumption by the parties that the transaction was legally effective.

The finding of an intention to create a sham did not disregard the actual intention of the parties but, significantly, was based upon what the transaction achieved and the finding of “a common intention that was inconsistent with the creation and the enforcement of the entitlement of the E & M Unit Trust as the beneficiary of the Raftland Trust”. This required an examination of the facts found by the trial judge and, in particular, the finding of a common intention that the Thomasz interests were to receive only $250,000 as the “price” for the acquisition by the Heran family of the E & M Unit Trust. In the joint judgment the High Court said:
The Heran brothers, and Mr and Mrs Thomasz, were business people, not lawyers. It is unlikely that they applied their minds with care to the detail of the documents that were prepared by Mr Tobin. That does not mean, however, that their intentions were irrelevant. It may mean, as a matter of factual inference, that they had no intentions inconsistent with the documents prepared by Mr Tobin and that, therefore, there is no reason to take those documents other than at face value. It may mean (as the Full Court, in substance, found) that they intended to do whatever was regarded by Mr Tobin as necessary to secure the fiscal objective of the exercise. On the other hand, the respondent argued, and Kiefel J held, that the Heran brothers and Mr and Mrs Thomasz had a common intention that was inconsistent with the creation and the enforcement of the entitlement of the E & M Unit Trust as a beneficiary of the Raftland Trust. It is, therefore, necessary to examine the findings of fact made by Kiefel J. Central to her Honour's reasoning was the $250,000 paid to the Thomasz interests as the "price" for the E & M Unit Trust. It was, her Honour held, the intention of the Herans, and Mr and Mrs Thomasz, that the Thomasz interests were to receive that amount and no more. Following such receipt, they were to make no further claim on the Raftland Trust.

Their Honours went on to conclude that there was "an inconsistency between the fiscal and the financial objectives of the transaction", and that the evidence as a whole justified the finding of the primary judge that the intention of the relevant people had been that only $250,000 was ever to be received by the beneficiaries of the E & M Unit Trust at the time the resolution was made.

The role of objective facts in determining a subjective intention

A significance for practitioners of the decision in Raftland is in the role played by objective facts in finding the shamming intention of the people whose intention was necessary to create a sham. The objective facts were found to be inconsistent with the practical consequences of the resolution taking effect as one might ordinarily have expected in the case of a genuine reduction. It would ordinarily be expected that the beneficiaries of a trust at the time of a resolution would enjoy the economic benefits flowing from the resolution, but in Raftland it was found that it was actually intended that this not occur. The parties intended that the Thomasz’ interests would not obtain

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16 Ibid, 536. [Emphasis added]
17 Ibid, 538 [58].
the benefits which would ordinarily be expected to flow from the distribution by the resolution to the E & M Unit Trust.

The outcome in *Raftland* was not based upon a rejection of the evidence that those making the resolution intended it to be legally effective to achieve its objectives, nor the rejection of the evidence that they thought that the resolution had been legally effective, but, rather, that that evidence of the actual intention needed to be determined in light of all of the other evidence about intention, including the objective consequences of what a resolution would ordinarily have achieved and a comparison of that with what the resolution in question did achieve. A comparison between that which might ordinarily be expected by the resolution with what was in fact achieved may, broadly speaking, be what lead to the finding that the intention of the parties had been to create a sham. It is also significant that the finding of an intention that the resolution was a sham was not based upon a narrow consideration of the evidence of the trustee making the resolution. The court did not confine itself to asking only whether those making the resolution intended it to be legally effective but, rather, found a sham upon a broader view of the evidence of what the parties to the transactions sought to achieve. The evidence of “the intention of the Herans, and Mr and Mrs Thomasz” was not confined to the evidence of what was intended by those who made the resolution, but took into account the evidence of the transaction as a whole including what the advisers had sought to achieve and was, in effect, attributed to the trustee making the resolution.

**The US Economic Substance Doctrine**

The analysis and finding of sham by the High Court in *Raftland* calls for two observations: first, to note the broad similarity of the approach in *Raftland* with the economic substance doctrine developed in the United States, and secondly, the potential application of the concept of sham to areas beyond taxation.

The economic substance doctrine developed in the United States of America finds expression in such cases as *Gregory v Helvering*18 in which the United States Supreme Court held that a transaction had not been a “reorganisation” within the meaning of a statute because the transaction had “no business or commercial

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18 293 US 465 (1935).
purpose”\textsuperscript{19}. The issue in that case had been whether what had taken place amounted to a “reorganisation” within the meaning of a taxing provision. The end result sought by the taxpayer from the transactions, which included the purported “reorganisation”, was not to be exposed to a higher tax liability that would have arisen from a more direct sale of shares. What the taxpayer, upon advice, had done, was to undertake what purported to be a reorganisation of companies and to claim an entitlement to rely upon a provision directed to corporate “reorganisations”.

The opinion of the United States Supreme Court, as well as that of Learned Hand\textsuperscript{20} in the Court of Appeals, rejected the taxpayer’s contention that what had occurred was a “reorganisation” within the meaning of the provision. The reason was not that the taxpayer’s motive determined the proper character of the transaction, nor that what had been done did not fit the words of the Statute, but that what had been put forward as a “reorganisation” was a sham because it was not considered by the courts to be what the legislature had contemplated as a reorganisation. Learned Hand, sitting in the Court of Appeal, said:

\begin{quote}
We agree with the Board and the taxpayer that a transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid or, if one choose, to evade, taxation. Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes. […] Nevertheless, it does not follow that Congress meant to cover such a transaction, not even though the facts answer the dictionary definitions of each term used in the statutory definition… [T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.\textsuperscript{21}
\end{quote}

The opinion of the Supreme Court, on appeal, placed emphasis on the absence of business or corporate purpose to a transaction (rather than the motive for the transaction) which might otherwise have appeared to come within the words used by the legislature:

\begin{itemize}
\item \textsuperscript{19} Ibid, 470.
\item \textsuperscript{20} 69 F.2d 809 (1934).
\item \textsuperscript{21} Ibid, 810-11.
\end{itemize}
Putting aside, then, the question of motive in respect of taxation altogether, and fixing the character of the proceeding by what actually occurred, what do we find? Simply an operation having no business or corporate purpose – a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner. […] The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because a transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.22

Although this analysis is not the same as that in Raftland, it does have an overlap and similarity with it. In both cases, something which purported to have had legal effect was found not to have done so. In both cases a determining feature of the outcome was that what the transaction did was not what one would expect to find in transactions of the kind they purported to be. There are, of course, significant differences between the reasoning in Raftland and the economic substance doctrine in the United States, however, the similarities suggest interesting issues for further exploration.

The second feature of interest from Raftland is the extent to which the doctrine can apply outside of the field of tax. Raftland was a tax case but the reasoning leading to the decision that the resolution was a sham is not restricted to tax cases. The basis of determining that something may be a sham by reference to a comparison between actual outcomes and purported outcomes has potentially broader application beyond taxation. Instruments and transactions are generally held to have the legal effect they purport to create and are not generally held not to have those legal effects because they do not achieve what they purport to achieve. The legal effect of something, in other words, is not usually determined by whether they are achieved but by whether they were intended. A consequence of the reasoning in Raftland, however, may be a need for trustees, and their advisers, to evaluate whether legal effects intended to be created by acts, instruments and transactions are able to be achieved.

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It is common, for example, for resolutions to be made purporting to vest rights in beneficiaries but which are not immediately enjoyed by those in whose favour they are made. The orthodox view of sham would consider such resolutions to be effective unless those making them intended them to be otherwise. The orthodox view of sham would ordinarily not decide whether such resolutions were shams by considering the resolutions in the context of any broader factual inquiry into what the trustee, or those controlling or influencing the trustee, may have achieved in a practical or economic sense. There may, however, now need to be considered whether what is purportedly achieved is actually achieved. Such questions for trustees, and their advisers, are not confined to resolutions but extend to any act done which purports to have legal effect. It is common for trusts to be employed as vehicles for economic activities in substitution for individuals in their personal capacities. Those acting as, or through, trusts often know little about trusts and behave as direct owners. It may not be difficult in such circumstances for questions to arise about whether the trust, or some aspect of the trust, may not be a sham to disguise the true position.

The statement of facts in the case of United States of America v Credit Suisse AG provides many useful reminders of how a question of sham may arise in commercial and financial dealings. A trust, by its nature, separates the legal ownership from the beneficial ownership of the trust estate or trust fund and, by its nature, may provoke the question of whether the legal rights created are as they purport to be. The intention of the parties is usually that the legal rights created by the trust is as they purport to be, but a wider inquiry into the facts may reveal a disconformity between the purported legal rights and the business and economic realities.

The Relevance of Motive

The motive of a party who is said to have created a sham may be irrelevant to determining whether a transaction is to be characterised as tax avoidance, but it may be relevant to determining the intention of those entering into the otherwise legally effective transaction. The majority in Raftland accepted that the tax avoidance purpose of the arrangements had significance to the identification of the legal rights created by the arrangements, although their Honours considered that those circumstances ought not to distract attention from the ultimate issues that needed to be

23 (E.D.Va, Cr No. 1:14CR188-RBS, 19 May 2014).
determined.\textsuperscript{24} The evidence about intention, however, must be evidence about the legal relations which are purportedly created and motive will not usually be relevant to that intention. A person may have a collateral motive for entering into a transaction which is nonetheless consistent the non-sham intention necessary for the transaction to have the legal effect which it purports to have. In \textit{Chase Manhattan Equities Ltd v Goodman} \textsuperscript{25} Knox J said that “mere impropriety of motive is no ground for treating a transaction as a sham”.\textsuperscript{26}

In \textit{Miles v Bull} \textsuperscript{27} Megarry J considered the relevance of motive to the assertion of sham in the context of a claim for possession of what had been a matrimonial home. The husband had sold the property to the plaintiff whilst the wife was still living in what had been the matrimonial home. The plaintiff sued for possession of the property and, in that action, the wife maintained that the sale had been a sham by her husband because, as she contended, the object of the husband had been to deprive her of her right, as against him, to occupy the property. Megarry J said:

\begin{quote}
[A] transaction is no sham merely because it is carried out with a particular purpose or object. If what is done is genuinely done, it does not remain undone merely because there was an ulterior purpose in doing it. […] After all, some genuine transactions within the family are carried out at low prices; and some genuine purchasers fail to discharge their obligation to pay the full purchase price, if the vendor is incautious enough to make this possible. Mere circumstances of suspicion do not by themselves establish a transaction as a sham; it must be shown that the outward and visible form does not coincide with the inward and substantial truth.\textsuperscript{28}
\end{quote}

In each case it will be necessary to determine precisely the intention that needs to be found as the sham; and the evidence about motive, to be relevant, must bear upon that intention by showing that there was no intention to create the rights which appear to have been created.

The distinction between collateral motive and a motive which is relevant to whether there is a shamming intention is important in the context of trusts and their

\textsuperscript{24} (2008) 238 CLR 516, 525 [8].
\textsuperscript{25} [1991] BCLC 897.
\textsuperscript{26} Ibid, at 921.
\textsuperscript{27} [1969] 1 QB 258.
\textsuperscript{28} Ibid, 264.
administration. Trustee resolutions of trust income are frequently made with the motive of achieving the best tax outcome, but such a motive, all things being equal, will be irrelevant to whether a sham was intended. A trustee’s resolution distributing income will usually create the legal rights and the actual consequences which the resolution purports to create, whatever might have been the collateral motive for doing so. A motive of minimising the burden of tax will, in the ordinary course, be irrelevant to whether a resolution was a sham. That will, of course, also generally be true of the creation of the trust.

**Emerging Shams**

A number of cases have considered the possibility of trusts, or parts of trusts, becoming shams (and presumably also ceasing to be shams) after their creation. In that context it will be important to bear in mind that the relevant inquiry will be into the existence of an intention to create a sham and not into whether there has been a breach of trust. In *Raftland* Kirby J accepted that a sham could “develop over time if there is a departure from the original agreement and the parties knowingly do nothing to alter the provisions of their documents as a consequence”.

Views on this appear to differ. The authors of *The Law of Trusts* maintained a different view (without, however, referring to the observation of Kirby J in *Raftland*):

> In a number of cases it has been argued that a category of "emerging" sham trusts exists with the effect that a trust which was not a sham when created can subsequently become a sham. Even though a valid trust may have come into existence, on this view, the trust will become a sham if the parties to it later share the intention that others should be deceived by the apparent relation. This reasoning appears to be fallacious.

Part of the reasoning in support of the proposition for which the learned authors contended appears to be that a trustee “who has bona fide accepted office cannot divest himself of his fiduciary obligation by his own improper acts”. A similar view was expressed by Dr Glover who concluded that the category of emerging sham

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“is flawed” and that the use of a trust deceptively or inconsistently with its true nature “is a breach of trust which does not deny the trust's existence”.³²

It may be difficult to talk in generalities about the issue because much will depend upon the content of what is said to be the sham, the specific facts of each case and the relevant intention which needs to be found to be a sham. However, whether sham may emerge in a trust that began genuinely, raises questions about distinguishing between a sham trust and a breach of trust. The issue also points to the need to be precise about what is impugned as a sham because what may be challenged as a sham may not be the trust itself but, rather, may be some step, act or other thing done purportedly pursuant to the trust. In Raftland it was not all of the trusts, or the whole of the transactions entered into, which were held to be a sham, but only that resolution of the arrangements comprising those trusts, resolutions and transactions which had purported to create a tax effective beneficial entitlement in the E & M Unit Trust. Indeed, as the majority observed, there was no challenge to the power of the trustee of the Brian Heran Discretionary Trust to apply the income of that trust to the Raftland Trust itself.³³ Plainly a trust may be genuine though subsequently used to facilitate a sham transaction, at least to the extent that all participants continue in the collusion.³⁴ The fact that the sham may also be a breach of fiduciary duty may not deny the sham its character of a sham, nor otherwise deny the trust as otherwise effective to impose duties on the trustee.

The Need to Revisit

The topic of sham trusts is likely to be of ongoing concern for some time to come for trustees, estate planners and their advisers. The reason for the concern is in part caused by the potential uncertainty of content when we refer to an intention to create a sham. However, something will not be a sham if it does what it appears to do. It may not do what it appears to do, and therefore it may be a sham, when the parties intend otherwise. That intention may be express, as is sometimes the case, or it may be found to be by comparing what is impugned does with what it purports to do. Sham

may, in other words, be found where the deception or false façade lies in creating an appearance of legal rights which are not intended to govern the parties, as well as in creating an appearance of actual consequences which are not intended to occur and do not occur. It is useful for trustees, estate planners and their advisers to keep such matters in mind as part of their duties as trustees and advisers.