

issue 1

# serle quarterly

the newsletter of serle court



I am delighted to welcome you to the first edition of Serle Quarterly in its new format. Advocacy and advice in relation to trusts and settlements has always been an important area of our work at Serle Court, and we have in recent years seen a considerable increase in our involvement in international trust litigation. This edition of the newsletter addresses some recent developments in this area of our practice.

On this page Frank Hinks examines the implications of the decision of the Royal Court of Jersey in the *Esteem* case. Inside, topics covered include conflicts of law issues in relation to settlements, time being of the essence for options in wills and the meaning of "benefit" for the purpose of the variation of trusts. On the back page Elizabeth Jones analyses the meaning of the *Hashmi* decision in relation to section 423 of the Insolvency Act 1986.

**Michael Briggs QC**

## sham trusts: whose intention?

A trust will be a sham where it is intended that there should be no genuine passing of control of trust property from settlor to trustee: where it is intended that the relationship between settlor and trustee should in reality be that of principal/agent or owner/nominee but with that reality disguised in the form of a trust. But is it necessary that both settlor and trustee should intend such disguised reality or is the intention of the settlor alone sufficient?

In general it is clear that a legal transaction will only be a sham if all parties had that intention: see Diplock LJ in *Snook v London & West Riding Investments Limited* (1967) 2 QB 786 at 802. However, in relation to sham trusts there has been a division in academic opinion with Lewin on Trusts (17th Ed. at 4-23) taking the view that a declaration of trust is in essence a unilateral transaction not dependent upon acceptance by the named trustees and hence the intention of the settlor alone is relevant: the contrary view is taken in Underhill & Hayton, Law Relating to Trusts and Trustees (16th Ed. at page 59).

This issue was considered at length by the Royal Court of Jersey in the *Esteem*

case decided on 13 June 2003 (part of the Grupo Torras litigation). The view of the court was that for a trust to be a sham this must be the common intention of both settlor and trustee at the date the settlement is constituted or (in relation to later added property) at the date the property is added (so-called transaction sham). The view of the Royal Court that the trustee as well as the settlor must intend a sham was approved by Rimer J in *Shalson v Mimran* [2003] EWHC 1637 stating at para. 190: "in the case of a settlement executed by a settlor and a trustee, it is insufficient in considering whether or not it is a sham to look merely at the intentions of the settlor. It is essential also to look at those of the trustee".

The views expressed in both cases were obiter. In *Esteem* the Royal Court held on the facts neither the settlor nor the trustee intended a sham. In *Shalson* the settlement which the Mimran parties sought to impugn was declared by the trustee Camtrust alone in exercise of its powers as trustee of three existing settlements: upon any view of the law it is impossible to see how the resettlement could have been a sham where the only person executing the settlement intended



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it to be genuine. Neither case may prove to be decisive of the academic debate, but even if in general both settlor and trustee must intend a sham in certain situations the intention of the settlor will be decisive. In *Midland Bank Plc v Wyatt* [1995] 1 FLR 696 husband and wife signed a trust deed purporting to give the entire beneficial interest in jointly owned property to the wife and their two daughters. The wife signed without understanding the nature and effect of the deed. The husband had no intention of giving their children an interest in the property: he simply wanted protection from prospective creditors. The deed was held to be a sham. In *Estem* the Royal Court approved this decision at para. 58 on the basis that "a party who goes along with a sham neither knowing or caring what he is signing (i.e. who is reckless) is to be taken as having the necessary intention". It is not

unknown for members of the offshore financial industry to market trusts as a financial facility, indifferent as to whether there is to be a genuine settlement or a glorified bank account to be operated in accordance with the instructions of the settlor: where the trustee has no positive intention of his own, not caring whether the trust is or is not a sham the intention of the settlor will be decisive.

But what of the settlor who intends a sham but (being advised how to take advantage of *Estem*) constitutes a trust with the most respectable of initial trustees (who are wholly innocent of any sham intention) but on the basis that after a decent interval he will use his powers to remove the initial trustees and appoint ciphers as trustees to effect his sham intention. Where the original trustees are used as little more than conduits for the

establishment of a sham trust there would appear to be little justification for regarding the intention of those innocent dupes as being in any way decisive of the validity of the trust.



**Frank Hinks QC**  
specialises in domestic  
and international trusts

## forum conveniens, choice of law and choice of jurisdiction



Mr Koonmen and Mr Bender were securities traders. Mr Koonmen was a US national living (at the relevant time) in Japan. Mr Bender was a former US national who was (at the relevant time) a Grenada passport holder living in Costa Rica. They became involved together in the operation of a hedge fund. Not unusually, the fund was owned and operated through a complex multi-jurisdictional corporate structure. As an offshoot of the fund, the Amber Employee Benefit Trust ("AEBT") was created of which Mr Koonmen and Mr Bender were (with others) discretionary beneficiaries. The AEBT trust deed was drafted by Jersey advocates and contained an Anguillian choice of law and forum clause. The trustee of the AEBT was (at the relevant time) STAL, a company incorporated in Anguilla.

The true terms of the AEBT became the subject of dispute and proceedings were commenced in the Royal Court of Jersey. STAL applied for a Beddoe order in Anguilla seeking directions as to its participation in the Jersey action.

Of the 8 defendants in the action, only 3 were resident in Jersey. The Greffier Substitute gave leave to serve proceedings on the other 5 out of the jurisdiction. There followed applications by various defendants either to set aside the service out and/or to stay the proceedings on grounds of forum non conveniens in favour of proceedings in Anguilla. The applications all failed before the Bailiff (Sir Philip Bailhache): (2002) 5 ITEL 247. The defendants appealed to the Court of Appeal, who gave judgment on 14th November 2002. In his judgment, Rokison JA referred to the criteria laid down by the English authorities and concluded that, save for one factor, the balance of convenience and the overall interests of justice were fairly evenly balanced between Jersey and Anguilla and that the plaintiff would thus have failed to satisfy the burden placed on him to justify proceedings in Jersey. However, as he noted,

the Court of Appeal must resist the temptation simply to substitute its own discretion for that of the Royal Court.

The decisive consideration in favour of allowing the appeal was the express choice of Anguillian law as the proper law of the AEBT and of Anguilla as the forum for resolution of disputes. The Bailiff had held that clear words were necessary to create an exclusive jurisdiction provision in a trust deed, but the Court of Appeal rejected the notion that there was any special rule of construction applicable in such circumstances or that there was any meaningful difference between a clause which conferred exclusive jurisdiction on a named forum and one which made it the forum of choice. Citing Dicey & Morris, *The Conflict of Laws*, it held that: "the true question is whether on its proper construction the clause obliges the parties to resort to the relevant jurisdiction irrespective of whether the word 'exclusive' is used." Accordingly, the leave for service out was set aside and (as against the Jersey resident defendants) the action was stayed.



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**James Corbett QC**  
appeared for STAL in the  
Anguillian Beddoe application

## will option: the essence of time?

Sometimes a will contains an option to buy land at the figure agreed between the executors and the Capital Taxes Office as its value for inheritance tax purposes and then specifies a time within which the option must be exercised. In such cases the grantee may have to make up his mind whether to exercise the option before knowing what the purchase price will be or risk losing the option.

One such case was *Re Bowles Deceased* [2003] Ch 422, where the value of the land was not agreed with the CTO within the specified time limit and the grantee felt unable to exercise the option until the value had been agreed. He brought proceedings for a declaration that time was not of the essence, and that he could exercise the option at any time until the expiry of a reasonable period after the value had been agreed with the CTO and notified to him.

The difficulty facing the claimant was that current textbooks indicate that if a will specifies a time limit for the exercise of an option the time must be strictly observed, and that the option will lapse if the grantee fails to exercise the option in time: see *Theobald on Wills*, paragraph 25-05; *Williams on Wills*,

paragraph 92.4. The impression given is that there is a rule of construction to this effect.

The authority relied on for this proposition is *Re Avard* ([1948] Ch 43), where the option was exercised a few days out of time, the grantee having been unaware that the option had become exercisable, and the lateness of the exercise was of no detriment whatever to anybody, and yet Roxburgh J held that time was of the essence and that the notice exercising the option was therefore invalid.

In *Re Bowles* the judge (Lawrence Collins J) declined to follow *Re Avard*. He preferred to follow the cases on gifts subject to a condition (*Re Packard* [1920] 1 Ch 596; *Re Goodwin* [1924] 2 Ch 26) which show that where the time limit is not observed the gift will not fail if the will does not specify the consequences of non-compliance and the parties can be restored to the same position as if the condition had been fulfilled.

He pointed out that the two cases on which Roxburgh J relied (namely *Brook v Garrod* (1857) 3 K. & J. 608 and *Powell v Rawle* 1 L.R. 18 Eq. 243) were cases in which the will specified the consequences of non-compliance

with the time limit, and therefore did not support the decision in *Re Avard*; and, unlike Roxburgh J, he considered that there was no relevant distinction between a gift subject to a condition and the grant of an option.

He therefore concluded that *Re Avard* was wrongly decided, and that the criticism of it in *Jarman on Wills* at page 1469 was justified, and he granted the declaration sought.



**Nicholas Asprey** appeared for the successful grantee in *Re Bowles*

## family benefit: variation on a theme

Many settlements which were made before 1970 (when the Family Law Reform Act 1969 came into effect) continue to be a source of family funds for the grandchildren or great grandchildren (or beyond) of the settlor, providing, for example, the money for a first house or flat. But the traditional structure of the family is no longer as fixed as it was forty years or more ago, when the settlor was making his disposition. Today's family, stable and cohesive, may not be based on a formal marriage, or may have some children born before their parents married. Under a pre-1970 settlement (or under a special appointment made under such a settlement) these children are likely to fall outside the class of family beneficiaries who can benefit.

Is it possible to write such children into the settlement by a variation approved by the court under the Variation of Trusts Act 1958? Any variation will need to contain a "benefit" for the existing minor children (or possible future children) who definitely do qualify as beneficiaries. At first glance, and viewing the position in financial terms, it is likely that these latter children would lose out, and their shares be diluted, by a variation which introduces new family members.

But "benefit" for the purposes of the 1958 Act should not be seen in financial terms alone. Every family situation is unique. Broadly speaking, however, one can reasonably

predict that, where the issue is equating the children of a family born within, and the children born without, marriage, the court will take a broader approach to "benefit" than looking only at financial benefit. Financial benefit is the starting point; but a consideration on behalf of a presently qualified minor of what is for his or her benefit will take into account also any general family benefit – for that child as an individual and for the family as a whole with that child as a member – which bringing in the new beneficiaries would produce. This benefit may be the avoidance of family dissension in the future, which would be likely to result from feelings of unhappiness or guilt or jealousy, if the terms of the settlement were not varied. Such an avoidance of dissension is a benefit which the court can be expected to recognise. Nevertheless, this "family benefit" will probably need to be allied to some perceptible financial benefit also for the presently qualified minors. This may be achievable without having to set aside a separate sum to be enjoyed by them alone. If, for example, there is in fact no current guaranteed entitlement for the presently qualified beneficiaries (perhaps the whole fund can be advanced out in another direction), it may be that a financial benefit can be produced for them by carving a slice out of the trust fund as a guaranteed fund for sharing between them and the family members now being introduced.

There is reported authority of some years ago on the 1958 Act (In Re C.L. [1969] 1 Ch 587 and In Re Remnant's Settlement [1970] Ch 560) which clearly points in the direction of the family approach outlined above. If, therefore, the terms of a family settlement made before 1970 are going to create discord because some children in the family were not born in wedlock, it is at least worth exploring the possibility of an application to the court under the 1958 Act. Nowadays, these applications are normally heard in private in accordance with CPR rule 39.2(f) and 39 PD 1.5(11).



**John Whittaker** has appeared, and advised, on variations of settlements involving situations of this kind

## section 423: the distinction between purpose and consequences

In *IRC v Hashmi* [2002] 2 B.C.L.C. 489, the Court of Appeal decided that under section 423 IA 1986 the purpose of defeating creditors does not have to be the dominant, but only a substantial, purpose of the transaction in order for a creditor to have the transaction set aside. This article examines what is meant by "purpose".

In her judgment in *Hashmi* (at paragraph 23), Arden LJ says "It is sufficient if the statutory purpose can properly be described as a purpose and not merely a consequence, rather than something which was indeed positively intended". Perhaps aware that this was not totally illuminating, she gave what she described as a "homely example", with 4 variations upon the theme of her posting a letter in conjunction with walking her dog (paragraph 24).

It seems fairly clear that in her judgment Arden LJ is using "object" as equivalent to "purpose"; ie the thing which is elicited by the question "why did you go for a walk". Laws LJ at paragraph 33 says that "what is required is that the claimant show that the donor...was substantially motivated by one or other of the aims" set out in section 423. Simon Brown LJ in paragraph 38 refers to a gift being made "partly out of a wish to avoid inheritance tax

and partly to escape his creditors". Both Laws and Simon Brown LJ say that if the judge were to find in any given case that the transaction is one which the debtor might well have entered into in any event, he should not then too readily infer that the debtor also had the substantial purpose of escaping his liabilities.

The distinction between purpose (in the sense of "object" or "aim") and consequences is important. To take Arden LJ's homely example, if I take the dog for a walk it is a necessary consequence that I will be getting some (probably much needed) exercise. I know that the walk will have this effect, but I am too lazy to go for a walk for that reason. Taking exercise is a consequence of, but no part of my purpose (or object or aim) in, going for a walk. The same distinction between foreseen consequences and "object" was recently recognised in the same context in *Re Esteem Settlement* [2002] JLR 53.

What does this mean in practice? For example, the decision would permit a debtor facing a claim to give Christmas presents to his children. To take an example more likely to be productive of attack under section 423; say you have 3 children, and you have given each of the first two a substantial gift on the occasion of their marriage. You want to make a similar gift

on the marriage of the third. You are embroiled in litigation which, if successful, will bankrupt you. Hashmi would allow you to give a similar gift to your third child, even though you know that the effect will be that your child and not your creditor will have the money. What if you believed that the claim against you was unlikely to succeed, and you wanted to enter into a tax planning transaction which you would have entered into in the ordinary course of events? (See *Re Mercer* 17 Q.B.D. 290) Does section 423 prevent a person from making any voluntary transfers while there is litigation threatened against him? Hashmi seems to say that section 423 does not.

Of course, the fact that the defeat of creditors is a necessary consequence of a transaction is a material factor in assessing what the state of mind of the debtor was. As in *Hashmi*, the court may not be very slow to infer that defeat of creditors was a purpose, and not merely a consequence, of the transaction.



**Elizabeth Jones QC** acts frequently in international trust matters and also in fraud and asset tracing matters

## chambers: news

Lord Neill of Bladen QC and Dominic Dowley QC are currently appearing for the liquidators in the *Three Rivers* case (the misfeasance proceedings brought against the Bank of England following the collapse of BCCI) having earlier persuaded the House of Lords to reject the Bank's attempt to strike out the action. Thomas Braithwaite is also part of the team.

The Serle Court Sports Law Group held a very successful seminar entitled "What lessons can be learnt from the Rugby World Cup?". The evening was chaired by the Minister for Sport, the Rt Hon Richard Caborn MP. A notable panel of speakers comprised: Darren Bailey (International Rugby Board) who flew in from Dublin to provide an overview of the

organisation of the World Cup tournament and the issues arising during that organisation, Adrian Barr-Smith (Denton Wilde Sapte) who spoke on the broadcasting issues arising from the World Cup and Nick Bitel (Max Bitel Greene) who, with England now possessing a squad of World Cup winners, spoke on the issue of salary caps.

Philip Jones has recently led a seminar for the Insolvency Lawyers Association in Paris where he explained the implications of *Re Spectrum Plus Ltd*, in which he successfully challenged the decision in *Siebe Gorman* that a bank could create a fixed charge over book debts by a mere direction to pay the proceeds into a current account.

Ann McAllister has been appointed a Recorder and has also become a CEDR accredited mediator and joins our very experienced panel of mediators.

We are also delighted to announce the appointment of our new Chief Executive, Nicola Sawford. Nicola joins us from the commercial world where she has spent the last four years as Finance Director for a number of technology companies. Previously, she trained as a Chartered Accountant with Price Waterhouse Coopers and then worked in a broad range of industry sectors including retail, media and financial services.