Mackinnon v Mackinnon; Mackinnon v Regent Trust Company Ltd

Jurisdiction:	Jersey
Judge:	Smith JA, Carey JA
Judgment Date:	19 May 2005
Neutral Citation:	[2005] JCA 66
Reported In:	[2005] JLR Notes 20, [2005] JLR 198
Court:	Court of Appeal
Date:	19 May 2005

Text

[2005] JCA 66

COURT OF APPEAL

Before:

R.C. Southwell, **Esq., Q.C., President**; P.D. Smith, **Esq., Q.C., and** Sir de Vic Carey, Bailiff **of Guernsey.**

Between
Andrew Kinross MacKinnon
Plaintiff/ APPELLANT
and
The Regent Trust Company Limited
First Defendant/ RESPONDENT

and

Kenneth James MacKinnon
Second Defendant

and

Elizabeth Victoria MacKinnon (née Sharman)
Third Defendant

and

Sebastian James MacKinnon
Fourth Defendant

and

Benjamin Thomas Skok MacKinnon
Fifth Defendant

and

Thomasin Anne Skok MacKinnon
Sixth Defendant

and

Sophie Linda Skok MacKinnon
Seventh Defendant

and

Alistair Kinross MacKinnon
Eighth Defendant

and

Ian James MacKinnon
Ninth Defendant

Advocate N.M. Santos Costa **for the Plaintiff/ APPELLANT.**

Advocate J.P. Speck **for the First Defendant/ RESPONDENT.**

Advocate C.G.P. Lakeman **for the Second, Third, Eighth and Ninth Defendants.**

Advocate M.L. Preston **for the Fourth, Fifth, Sixth, and Seventh Defendants.**

Authorities

Re Knights (Jersey) Limited [1962] JJ 207.

Re Langlois [1985–86 JLR 392].

Poole v Poole (16th March, 1988) Jersey Unreported; [1987–88 JLR N-5].

Lazard Bros. v Bois & Bois [1987–88 JLR 639].

Rahman v Chase Bank (CI) Trust Co Limited [1991 JLR 103].

In Re Joseph Eagle Settlement (23rd February 1999) Jersey Unreported; [1999/38].

In Re Esteem Settlement [2000 JLR 119].

In Re Esteem Settlement [2003] JRC 092.

Shaw v Lawless (1838) 5 Cl & Finney 129.

Smith v Warde (1845) 15 Sim 56.

Bentley v Mackay (1851) 15 Beav 12.

Walker v Armstrong (1856) 8 De G.M. & G. 531 (CA).

Bowes v Foster (1858) 2 H & N 779.

Dutton v Thompson (1883) 23 Ch D 278.

Re Watson (1890) 25 Q.B.D. 27.

Madell v Thomas & Co [1891] 1 Q.B. 230 CA.

Polsky v S & A Services Ltd [1951] 1 All ER 185.

Polsky v S & A Services Ltd [1951] 1 All ER 1062.

Snook v London & West Riding Investments Limited [1967] 2 QB 786.

Re Vandervell's Trusts [1974] Ch 269.

Re Butlin's Settlement Trusts [1976] Ch 251.

Re Slocock's Will Trusts [1979] 1 All ER 363.

Street v Mountford [1985] AC 809.

Hadjiloucas v Crean [1988] 1 WLR 1006.

Antoniades v Villiers [1990] 1 AC 417.

Gibbon v Mitchell [1990] 1 WLR 1304.

Chase Manhattan Equities Ltd v Goodman and Others [1991] BCLC 897.

Re Goldcorp Exchange Limited [1995] 1 AC 74.

Midland Bank plc v Wyatt [1997] 1 BLCL 242.

Twinsectra v Yardley [2002] 2 All ER 377.

Matthews: “In the land of the blind, the one-eyed salesman is king” — The Jersey Law Review — June 1998 Volume 2 Issue 2.

Underhill and Hayton, Law of Trusts and Trustees (16 th Ed'n): pp 73–83.

Lewin on Trusts, 17 th Ed'n paras 4–01 to 4–04; 21–96.

Allen & Overy Trust Litigation Quarterly December 2003, Issue 14, pp 6–8.

AG v Weston (1979) JJ 141.

Rabin v Gerson Berger Association Ltd [1986] WLR 526 (CA.).

RSC (1999): para 18/7/11.

Cross and Harris: Precedent in English Law (4 th Ed'n) (1991): p.72.

Phipson on Evidence (15 th Ed'n) (2000): paras 42–48.

Abacus (CI) Ltd, Trustee of the Esteem Settlement: Grupo Torras SA et al v Sabah et al (9th January, 2001) Jersey Unreported [2001]JLR005.

Hitch v Stone [2001] STC 214 at pp. 229–230.

Appeal, adjourned on 28th February, 2005, by the Plaintiff/APPELLANT against the Order of the Royal Court of 6th December, 2004, whereby the Royal Court ordered that certain paragraphs of the Plaintiff/APPELLANT's Order of Justice be struck out as disclosing no reasonable cause of action.

THE PRESIDENT:

1 This appeal concerns only questions of pleading in an action brought to upset three family settlements made by the late Mrs Dorothy MacKinnon, who died on 15 August 2002. The Plaintiff Andrew MacKinnon (“Andrew”) is one of her two sons; the other is Kenneth James MacKinnon (“James”), the Second Defendant. The Third Defendant is the wife of James, and the Eighth and Ninth Defendants are their children. The Third to Seventh Defendants are the children of Andrew. The First Defendant, The Regent Trust Company Ltd (“the Trustee”), is the Trustee of the three settlements, having succeeded Salamis International SA (formerly Salamis Trustees SA) in February 2001.

2 The three settlements were made by Mrs MacKinnon in 1981, 1998 and 1999 and are referred to by reference to these dates. Andrew alleges in his Order of Justice that the three settlements either have been at all times invalid and of no effect, or took effect only to the extent that the assets purportedly held subject to the settlements were held for Mrs MacKinnon absolutely, because

(i) the settlements breached the rule *donner et retenir ne vaut*; or

(ii) Mrs MacKinnon and Salamis did not intend to create trusts on the terms of the three settlement deeds, but intended that the assets of the settlements be held to the order of Mrs MacKinnon.

3 It is to be regretted that this dispute within a family about money has not been settled by counsel or by mediation.

4 Initially the Trustee took the lead in resisting Andrew's attack on the settlements. That was understandable in view of the allegations contained in the Order of Justice. Andrew and the Trustee recently reached an agreement as a result of which the Trustee will adopt a neutral stance. That has had the effect of placing James in the firing line.

5 The Court is, on this appeal, concerned only with the second head of claim, in paragraph 2(ii) above. We are not concerned with the *donner et retenir ne vaut* head of claim, in respect of which I would wish only to say that I reserve my judgment as to the correctness of the decision on this head of claim in *Abdel Rahman v Chase Bank (CI) Trust Co Ltd et al* (1991) JLR 103.

6 It is not wholly clear what is Andrew's case, not least because his case has been put somewhat differently before the Master, before the Bailiff and before this Court. We are concerned only with the case as Advocate Santos Costa for Andrew has put it before this Court. Advocate Lakeman appeared for James, but we did not call on him to reply.

7 Before turning to Andrew's case as now put, there is one point on which I wish to place some emphasis. These were trusts apparently established in favour of wide-ranging classes of family members. True it is that the range of potential beneficiaries had been narrowed, by exclusion, to Mrs MacKinnon and her descendants and James's wife. But it remains the position that there were ten potential beneficiaries (and the possibility of further beneficiaries yet to be conceived and born). Leaving Mrs MacKinnon out of account, that means that, if Mrs MacKinnon did not intend the settlements to operate as genuine trusts for the potential benefit of the other potential beneficiaries, she could be said to have been pretending, from 1981 to 2002, to establish trusts for the potential benefit of her family members, but in truth setting up no such trusts for their potential benefit at all. Here there were in the first instance numerous family members potentially to be affected, and in the end the nine members parties to this action who would be affected, if the three settlements were held to be invalid and intended by Mrs MacKinnon always to have been invalid. The

Courts of Jersey would not readily conclude against a deceased mother and grandmother that she had acted in this way in relation to her children, her daughter-in-law and her grandchildren.

8 Andrew's aim, apparently, is to have it decided that the present assets of the three settlements vest in and form part of the estate of Mrs MacKinnon, from which presumably he would gain a larger share of the family money than under the trusts of the three settlements.

9 It seems to me to be unnecessary to set out the procedural history of these proceedings at any length. On 1 March 2004, over 14 months ago, the Trustee issued a summons seeking an order that certain parts of Andrew's Order of Justice be struck out on the ground that the second head of claim (see paragraph 2(ii) above) discloses no reasonable cause of action. The Master refused the application on 29 June 2004. On 6 December 2004 the Bailiff sitting alone in the Royal Court allowed an appeal by the Trustee and struck out those parts of the Order of Justice. As a result of the agreement between Andrew and the Trustee, James is now the principal respondent to this appeal.

10 The way in which Andrew puts his case, as stated by Mr Santos Costa to this Court, is that

Indeed Mr Santos Costa strongly contended that Andrew is entirely unable to plead any intent on the part of Mrs MacKinnon to mislead anyone.

> (i) the trust deeds did not accord with Mrs MacKinnon's intentions throughout the period from 1981 to 2002, her intentions being that the assets placed in the three settlements should always be hers alone, held by the Trustee for her absolutely; and
>
> (ii) insofar as this involved Andrew in alleging that the three settlements amounted to “sham” documents, it is sufficient for this purpose for Andrew to rely on the intentions either of Mrs MacKinnon alone or of her and Salamis; and
>
> (iii) insofar as he relies on the settlement documents as being “shams”, it is unnecessary for him to allege that either Mrs MacKinnon or Salamis intended to give to any third parties any false impression of the effect of the settlement deeds.

11 In his judgment the Bailiff stated (in paragraphs 6–7) in terms agreed to be correct the test to be met if an application to strike out the whole or a material part of a pleading, on the ground that it discloses no reasonably arguable basis of claim, is to succeed. I agree and need not repeat what the Bailiff there stated.

12 It seems to me to be convenient first to deal with the case as to the settlements being “shams”, and then subsequently to consider whether or not there is a wider jurisdiction than that relating to “sham” transactions on which Andrew can rely.

"Shams"

13 The essential point for Andrew's purposes is that set out in paragraph 10(iii) above, whether Andrew has to allege, on the part of Mrs MacKinnon and Salamis, an intention to give to third parties (especially here the potential family beneficiaries) a false impression as to the effect of the deeds.

14 I agree with the Bailiff that Andrew has so to allege, and with his reasoning on this point. I would be content to adopt his reasoning as my own. But as we have received from Mr Santos Costa lengthy written submissions and have heard his oral arguments in full, I will briefly set out my own reasons for concluding that the Bailiff reached the correct decision.

15 In *Abacus (CI) Ltd, Trustee of the Esteem Settlement: Grupo Torras SA et al v Sabah et al* (9th January 2001) Jersey Unreported [2001] JLR 005 the Deputy Bailiff, had occasion to consider what were the necessary ingredients for a claim that trust deeds were shams, at paragraphs 42–60. He held that it must be shown that both settlor and trustee had a common intention that the true position should be otherwise than as set out in the trust deed which they both executed. I agree. The Deputy Bailiff went on in that passage to consider whether an intention of both settlor and trustee to mislead third parties or the Court, by giving the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create, is a necessary ingredient for such a claim. He held that this is a necessary ingredient. Again I agree. He so held in reliance on the relevant English authorities, as did the Bailiff in this case; and in my judgment, this branch of the law having been most fully developed in England and Wales (and also in Australia), it is entirely appropriate that Jersey law should take full account of English law in this regard.

16 The classic definition of a sham is to be found in the judgment of Diplock, LJ in *Snook v London & West Riding Investments Limited* [1967] 2 QB 786 at 802:

> ***"As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a "sham", it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word.*** I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co v MacLure* (1882) 21 Ch.D. 309 CA ***and*** *Stoneleigh Finance Limited v Phillips* [1965] 2 QB 537), ***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 has been reconsidered by the English Court of Appeal in *Hitch v Stone* [2001] STC 214 at pp. 229–230, where Arden LJ (with whom the other Judges agreed) said this:

> ***"62. Before turning to the issues as I have formulated them, I will set out the principles which are in my judgment the relevant principles as respects sham transactions.***
>
> ***63. The particular type of sham transaction with which we are concerned is that described by Diplock LJ in*** *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786. ***It is of the essence of this type of sham transaction that the parties to a transaction intend to create one set of rights and obligations but do acts or enter into documents which they intend should give third parties, in this case the Revenue, or the court, the appearance of creating different rights and obligations.*** The passage from Diplock LJ's judgment set out above has been applied in many subsequent decisions and treated as encapsulating the legal concept of this type of sham. Mr Price referred us to *Sharment Pty Ltd v Official Trustee in Bankruptcy* (1988) 82 ALR 530 ***in which the Federal Court of Australia drew on Diplock LJ's formulation of sham in Snook.***
>
> ***64. An inquiry as to whether an act of document is a sham requires careful analysis of the facts and the following points emerge from the authorities.***
>
> ***65. First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.***
>
> ***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.***
>
> ***67. Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.***
>
> ***68. Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they***

agreed to vary their agreement and that they have become bound by the agreement as varied (see for example *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* (1966) 1 QB 650 ***at 683–684 per Diplock LJ, which was cited by Mr Price)*** .

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

As Arden LJ made clear in this summary, the parties (here Mrs MacKinnon and Salamis) must have intended to give a false impression of the rights and obligations (if any) which they had created to third parties, and that intention must be a common intention, if the claim that the settlements are shams is to be reasonably capable of argument.

18 More recently in *Shalsom v Russo* [2003] EWHC 1637 (Ch.D: Rimer J) the English High Court considered whether the principles expounded in *Snook* and *Hitch* were applicable to the creation of a trust. Rimer J began in paragraph 187 with citation of the same passage from *Snook*, and continued:

"188. Those principles were re-affirmed and applied by the Court of Appeal in *Hitch and others v Stone (Inspector of Taxes)* [2001] EWCA Civ 63; [2001] STC 214: ***see paragraphs 62–70 of Arden LJ's judgment, with which Sir Martin Nourse and Kay LJ both agreed. At paragraph 69, Arden LJ re-emphasised that the relevant intention must be a common intention. After a careful consideration of the authorities, the Royal Court of Jersey held in*** *Abacus (CI) Limited and Others v Sheikh Fahad Mohammad al Sabah and Others*, 13 June 2003, unreported ***(to which I was referred by counsel after I had reserved judgment) that the like principle applies to an allegedly sham settlement: both the settlor and the trustee must intend the settlement to be a sham, and they rejected the proposition that all that counts is the settlor's intention. They considered*** *Rahman v Chase Bank (CI) Trust Co. Limited* (1991) JLR 103 ***(a case on which Mr Smith placed some reliance) and concluded that it was not possible to derive from it any decision to the effect that it is sufficient to look only at the settlor's intention in considering whether a settlement is a sham."***

I leave out paragraph 189 which dealt with the specific facts of the *Shalsom* case. He continued:

"190 Despite Mr Smith's 12-page submissions to the contrary effect, I respectfully regard the approach adopted by the Royal Court in the *Abacus* ***case as correct.*** It is not only squarely in line with the guidance given by the Court of Appeal in *Snook* ***and*** *Hitch*, ***it also appears to me to be correct in principle.*** When a settlor creates a settlement he purports to divest himself of assets in favour of the trustee, and the trustee accepts them on the basis of the trusts of the settlement. The settlor may have an unspoken intention that the assets are in fact to be treated as his own and that the trustee will accede to his every request on demand. But unless that intention is from the outset shared by

> the trustee (or later becomes so shared), I fail to see how the settlement can be regarded as a sham. Once the assets are vested in the trustee, they will be held on the declared trusts, and he is entitled to regard them as so held and to ignore any demands from the settlor as to how to deal with them. I cannot understand on what basis a third party could claim, merely by reference to the unilateral intentions of the settlor, that the settlement was a sham and that the assets in fact remained the settlor's property. One might as well say that an apparently outright gift made by a donor can subsequently be held to be a sham on the basis of some unspoken intention by the donor not to part with the property in it. But if the donee accepted the gift on the footing that it was a genuine gift, the donor's undeclared intentions cannot turn an ostensibly valid disposition of this property into no disposition at all. To set that sort of case up the donee must also be shown to be a party to the alleged ***sham.*** In my judgment, 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."

I agree with Rimer J. It is also clear from his judgment that in referring to the need for a common intention of settlor and trustee, he was including the need for an intention to give a false impression to third parties. (I should add, in parenthesis, that it is because of considerations such as those expressed by Rimer J in paragraph 190 (see also the Deputy Bailiff in *Esteem* at paragraph 53(iii)) that I have reservations as to the correctness of the decision on the other head of claim in *Rahman*.)

19 In his submissions Mr Santos Costa equated "giving a false impression" to "deceit". That in my judgment is not correct. Deceit is an English tort with particular requirements. What is required in a case based on "sham" is a common intention to give a false impression.

20 In my judgment the position in Jersey law is clear. In order to succeed in showing that the three settlements are shams, Andrew must establish that

> (i) both Mrs MacKinnon and Salamis intended that the true position would not be as set out in the settlement deeds, but that either the settlements were invalid and of no effect, or that the assets of the settlements were held for Mrs MacKinnon absolutely, so that the assets were simply held to her order, and
>
> (ii) both Mrs MacKinnon and Salamis intended to give a false impression to a third party or parties (including the other beneficiaries and the Courts) that the assets had been donated into the settlements and were held on the terms of the deeds.

21 Through Mr Santos Costa, Andrew disclaims any reliance on any such intention on the part of Mrs MacKinnon (and presumably also on the part of Salamis). That being so, Andrew cannot succeed in his contention that the settlements were shams, and the Bailiff rightly struck out the relevant paragraphs of the Order of Justice.

22 Mr Santos Costa did not directly challenge the authority of *Snook*, or *Hitch*, or *Shalsom*. Indeed he would not have taken this Court to *Hitch* or *Shalsom* if I had not insisted that he do so. Instead he referred to a plethora of other authorities ranging across a number of different bases on which the English courts have held that trusts might be reformed or rectified because of operative mistake, or transactions designed to evade statutory controls having held not to succeed in that design. Most are of little or no relevance, and have been called in aid to build a tower of cards with no firm foundation. Some were apparently relied on by him in support of a wider jurisdiction of the Courts to interfere with trusts than the jurisdiction to reject "sham" transactions. Many were dealt with by the Bailiff in paragraphs 26 and following of his judgment. I agree with what the Bailiff said about them. I propose to refer only to those cases cited by Mr Santos Costa in his oral argument before this Court, presumably because he regarded them as the strongest basis for his contentions, and to do this in the same order as Mr Santos Costa.

23 In *Shaw v Lawless* (1838) 5 Cl & F 129 HL (Ir.) the House of Lords considered whether words used in a will created a trust in favour of Lawless, and decided that the words did not create a trust. This case is entirely irrelevant.

24 In *Gibbon v Mitchell* [1990] 1 WLR 1304 the trusts of a marriage settlement contained no power for Mr Gibbon to surrender his life interest. Solicitors advised him to execute a deed for this purpose, but this was a fundamental mistake, because it had the totally different effect of causing a forfeiture of his life interest with disadvantageous consequences for the family. Lord Millett (then Millett J) set the deed aside for mistake, basing this on authorities as to "the circumstances in which a voluntary disposition can be rectified, reformed or set aside where it has been entered into under a mistake, contrary to the intentions of the disposer, or in excess of his instructions." (page 1307). He cited a number of cases where a serious mistake of this kind by solicitors has led to the grant of such relief, including *Walker v Armstrong* (1856) 8 De G.M & G 531 (Chancery Appeals). He summarised the legal principles underlying those cases (at page 1309) as follows:

> ***"In my judgment, these cases show that, wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did.*** It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it."

Andrew does not seek to rely on mistake in the present case: indeed it would be very difficult to do so after the settlements had existed for so long: and anyway it would be for Mrs MacKinnon, not Andrew, to sue on such ground. Gibbon was a case in which the donor wished to achieve a result but failed through the solicitor's mistake. Here there was no question of Mrs MacKinnon having failed to achieve a desired result. The case of *Gibbon* provides no assistance to Andrew.

25 I have already referred to *Walker v Armstrong*, another case of fundamental mistakes by solicitors, described in colourful language.

26 *Polsky v S & A Services* [1951] 1 All ER 185 Lord Goddard LCJ and [1951] 1 All ER 1062 CA was a case in which a transaction was dressed up as a sale by the plaintiff to the defendants and a reverse hire-purchase agreement, but the plaintiff succeeded in showing that in reality it was an assurance of personal chattels as security for his debt, and therefore an unregistered bill of sale and void under the relevant statute. At page 188 Lord Goddard said:

> ***"There is no doubt, I think, as to the deciding principle.*** The court has to determine whether the transaction in question is a genuine sale by the ***original owner of the chattel to the person who is finding the money and a genuine re-letting by the latter to the original owner on hire-purchase terms, or whether the transaction, though taking that form, is nothing more than a loan of money on the security of the goods."***

Polsky does not, in my view, assist Andrew at all.

27 A similar case was *re Knights (Jersey) Limited* (1962) JJ 207 decided by the Royal Court. This was cited only for the passage at page 210:

> ***"Finally, the Court wishes to add this, that it will not readily uphold documents which are fiction in the sense that they bear no real relation to the facts of a transaction the terms of which they purport to embody and which refer to non-existent documents or to events which have not happened."***

This was another case in which a purported transfer of a car was held to be no more than an attempt to borrow money on the security of goods.

28 In *AG Securities v Vaughan*: *Antoniades v Villiers* [1990] 1 AC 417 agreements were made between landlords and occupants of residential flats. The question for the House of Lords in each case was whether the agreements were licences outside the Rent Act controls or tenancies within those statutory controls, and this involved the consideration whether the transactions were pretended to be outside the controls, though in reality within the controls. Lord Oliver at page 469 referred to the potential relevance of subsequent conduct as admissible evidence as to whether the documents were genuine or not. Lord Jauncey dealt with the lack of genuineness of one of the transactions at page 470. These were the only passages to which Mr Santos Costa took us, and in my judgment they do not carry forward Mr Santos Costa's contentions at all.

29 In *Bentley v Mackey* (1851) 15 Beavan 440 Romilly MR had to decide whether, by certain acts of the donor, a valid voluntary settlement had been created. This case is irrelevant.

30 In *Chase Manhattan Equities Ltd v Goodman* [1991] BCLC 897 Knox J had (amongst many other issues) to decide whether a deed of gift of shares by a man to his mistress was a sham. He referred first to the passage from Diplock LJ's judgment in *Snook* and to Lord Templeman's use of the word “pretence” in *AG Securities*. Knox J at pp. 921–922 said this:

> ***“Immediately before the deed of gift was executed Mr Goodman was the beneficial owner in equity, subject to the rights of Nat West Bank by way of charge, of the shares in question.*** … On its face the transaction effected by the deed of gift was an outright gift to Mrs Fitzgerald of that beneficial interest. The deed of gift can only be a sham in my judgment if it is shown that the parties to it intended that Mr Goodman should remain the beneficial owner of the shares comprised in it. That result could theoretically be achieved in two ways. The first would be by showing that the deed of gift was not intended to have any effect at all and the second would be by showing that the deed of gift was intended to effect an assignment of Mr Goodman's equitable interest and that Mrs Fitzgerald should hold it upon trust for him. There is no difference in substance between the two and since the deed of gift clearly purports on its face to be a beneficial gift, and not an assignment to be held upon trust by the so-called donee for the so-called donor, both would in my view properly be termed a sham because they would be different from the transaction purportedly effected by the deed of gift.
>
> ***What would not in my judgment be sufficient for this purpose would be to show that the deed of gift was entered into in circumstances where Mr Goodman would have been entitled to have it set aside as a voidable transaction due to Mrs Fitzgerald's undue influence nor a fortiori to show that Mr Goodman's trustee in bankruptcy would have been entitled, should he be made bankrupt, to have the deed of gift set aside as a transaction at an undervalue or, to use the old fashioned expression a conveyance to defraud creditors.*** It is clear enough that mere impropriety of motive is no ground for treating a transaction as a sham.
>
> ***It was submitted on behalf of Mrs Fitzgerald that what had to be shown was,***
>
> > ***(1) an identification of the underlying transaction, by which I understand to be meant the transaction which the parties genuinely intended to enter into, and***
> >
> > ***(2) the knowing participation by both parties in the deliberate concealment of that underlying transaction by representing it as a transaction of a different nature.***
>
> ***That overstates the requirements in that it is not necessary for the parties affirmatively to intend to enter into any particular transaction once it is shown that the ostensible transaction was a pretence.*** This seems to me to follow from Diplock LJ's insertion of the parenthesis “(if any)” in his formulation of the concept when he referred to the actual legal rights and obligations which

the parties intended to create.

> ***Similarly it is not necessary that the parties to a transaction which is properly characterised as a sham should have the same motivation.*** One of the commonest examples of a sham is the transaction between landlord and tenant which is, to use Lord Jauncey's expression, dressed up to look like a licence as in *AG Securities v Vaughan*, *Antoniades v Villiers* [1988] 3 All ER 1058, [1990] AC 417 ***itself.*** It is self-evident that their motivation is diametrically opposed one to the other. What they do have in common is the acceptance of a pretence."

At page 923 he said this:

> ***"A pleading that a transaction is a sham is in my judgment sufficient in itself and does not need particularisation of the parties' motives which are irrelevant.*** It follows that lack of community of motive is equally irrelevant."

Mr Santos Costa sought to rely on this statement of Knox J in support of his contention that it is unnecessary for Andrew to plead a common intention to give a false impression. In my judgment, first, Knox J was dealing only with motive which is not the same as intention, and secondly, if by "motivation" he meant "intention", his statement is not a correct one. The cases which I have cited much earlier in this judgment show that a common intention to give a false impression to third parties is a necessary element in this head of claim, and must be pleaded.

31 Those are the cases to which Mr Santos Costa made specific reference in support of his contentions.

32 In my judgment the position in this case can be summarised in this way:

(i) Common intention of Mrs MacKinnon and Salamis to give a false impression to third parties is a necessary factor in Andrew's claim that the three settlements are shams.

(ii) Andrew accepts that he cannot allege any such common intention.

(iii) Accordingly the sham head of claim cannot succeed and the relevant paragraphs were rightly struck out by the Bailiff.

(iv) There is no general power in the Courts of Jersey to give Andrew the relief which he seeks. Any claim by Andrew has to be based on a recognised head of claim such as mistake, duress, undue influence, fraud, sham or perhaps the *donner et retenir ne vaut* principle. The Bailiff dealt with Mr Santos Costa's submissions as to the existence of such a general power in paragraphs 26 and following, dealing with all the cases cited including most of those which I have cited above. I agree with the Bailiff that none of those cases provides any support for the existence of any such general power in the law of Jersey.

(v) The Bailiff relied, in part, on considerations of public policy. I do not find it necessary to ride “the unruly horse” of public policy, because in my judgment the answer to this head of claim is clear.

33 It follows that I would dismiss the appeal, and uphold the judgment and order of the Royal Court striking out the relevant parts of the Order of Justice.

34 It is the practice of the Court of Appeal of Jersey to deliver judgment in the week in which the appeal is heard, save in exceptional cases: this appeal involves a pleading point and is not exceptional. I am conscious that I have not dealt with every nuance of Mr Santos Costa's lengthy written submissions and oral arguments. But I believe that I have dealt with all the principal matters on which he relied and with all the central issues arising for decision on this appeal.

Smith JA

I agree and have nothing to add.

Carey JA

I also agree and have nothing to add.