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Articles

- 'Sham trusts' and ascertaining intentions to create a trust
— *Ying Khai Liew* 237

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According to received wisdom, 'sham trusts' is a doctrine which provides an exception to the normal objective process of ascertaining intentions to create a trust by permitting courts to give effect to subjective intentions as the 'true' intention. This article makes three points. First, that approach does not properly reflect how courts deal with sham trusts: courts are not concerned with ascertaining subjective intentions when dealing with 'sham trusts'. Second, 'sham trust' cases are but specific factual applications of a general approach, namely that an objective intention to create a trust is ascertained from any admissible evidence accepted by the court as being relevant to its inquiry. Thus, there is no separate 'sham trust' doctrine, and therefore no special requirements to be fulfilled (such as an intention to deceive) for legal effect to be withheld from a trust instrument. Third, the general approach can be particularised in the form of a flexible framework, which explains how courts deal with the admissible evidence. While any relevant evidence is admissible, certain types of evidence are given more weight than others.

- Common law tracing: The emperor's new clothes?
— *Mohammud Jaamae Hafeez-Baig and Jordan English* 260

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At the heart of the case for the unification of common law and equitable tracing rules is an assumption, namely, that common law tracing rules exist and are separate from equitable tracing rules. In this article we challenge the correctness of that assumption in Australian law. We demonstrate that as a matter of authority and principle, tracing at common law is not, and has never been, possible. The erroneous assumption began with a misreading of *Taylor v Plumer*. English courts have since recognised this error but have held, in effect, that it is now too late to turn back. We show that Australian law has not yet taken this step and offer several reasons why it should not do so. The position that obtains is that there are only equitable tracing rules in Australian law. We demonstrate that these rules are sufficient, noting in particular that the equitable rules can support certain actions for money had and received (as demonstrated by *Heperu Pty Ltd v Belle*). The result is not a unification of tracing rules but rather the removal of a historical anomaly based upon an error.

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Many equitable doctrines are said to rest on the maxim that equity will not permit the Statute of Frauds 1677 (or its successors) to become an instrument of fraud. But that convenient formula has tended to conceal fundamental changes in the justifications for these doctrines, which have used variants of fraud first to override, then to interpret, and finally to sidestep the legislation. By identifying the assumptions historically underpinning each type of argument, this article suggests that no justification for any of the doctrines conforms to modern principles of equity and parliamentary power. In doing so, it incorporates analysis of the recent decision in *Pipikos v Trayans*, and generalises Nettle and Gordon JJ's assessment of part performance as 'an historical anomaly' that 'defies logically satisfactory analytical treatment'. In turn, this conclusion exposes tensions in the application of these doctrines, equity's response to statutory registration systems, and theories of legal coherence.

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This article argues that constructive trusts cannot be transplanted into civil law jurisdictions. Instead, cases involving common law constructive trusts should be re-characterised as involving remedies that respond to issues arising from the law of property, contract, unjust enrichment, or negotiorum gestio. Since scenarios giving rise to a constructive trust response essentially transcend various fields of private law under the civil law system, constructive trusts have inevitably looked systematically amorphous, indefinable, and thus difficult to grasp for the civil lawyer. Meanwhile, critical analysis of individual constructive trust cases from a civil law perspective has been sparse. This has led to an epistemological gap between the common law understanding of constructive trusts and civilian private law analysis. This article attempts to fill this gap by analysing constructive trusts from macro and micro-level comparative perspectives.