

Private Client Briefing

Russell McVeagh

Any questions? Talk to one of our experts



Nathaniel Walker

Partner
Litigation

nathaniel.walker@russellmcveagh.com
+64 4 819 7858



Priscilla Brown

Special Counsel
Litigation / Private Client

priscilla.brown@russellmcveagh.com
+64 9 367 8824



Joanna Trezise

Senior Associate
Litigation / Private Client

joanna.trezise@russellmcveagh.com
+64 9 367 8896



Greg Neill

Partner
Tax

greg.neill@russellmcveagh.com
+64 9 367 8891



Tim Clarke

Partner
Public Law (Immigration)

tim.clarke@russellmcveagh.com
+64 4 819 7532



Tony Sycamore

Partner
Corporate Advisory

tony.sycamore@russellmcveagh.com
+64 3 470 3724

Johnson v His Majesty's Attorney-General [2025] EWHC 1943

The English High Court decision of *Johnson v His Majesty's Attorney-General* [2025] EWHC 1943 is the first time that an English court has sealed a non-royal will, contrary to the ancient tradition that wills are available to the public.

Background

Johnson centred on the grant of probate for the will of a Mr Frank Cowley, formerly known as Freddie Scappaticci. Mr Cowley was allegedly a core member of an IRA internal discipline squadron called the "Nutting Squad" who located, interrogated, and murdered British spies. He was also, supposedly, a legendary double agent for the British army codenamed "Stakeknife". Although Mr Cowley was put into witness protection in 2003 after his purported identity was leaked to the press, he continued to receive threats until his death on 20 March 2023. After his passing, the solicitors named as his executors renounced their role and so the applicant, given a pseudonym by the court, offered to act as Mr Cowley's personal representative provided that the will was sealed from the public.

The decision

The High Court began by acknowledging that, although all wills are generally open to inspection by the public, the English courts retain a discretion to seal wills if they deem public inspection to be "undesirable or inappropriate".¹ The Court also noted that this was the first ever application for the sealing of a non-royal will (there is a long running tradition that the royal wills are kept sealed from the public). The High Court then summarised the five factors which underpinned the public's right to inspect wills, being:²

- i. publicity should ensure that effect is given to the wishes of the testator;
- ii. the task of notifying and tracing legatees may be facilitated if the will is made public;
- iii. publication of a will might serve a general interest in notifying the deceased's creditors of the death;
- iv. in circumstances where a testator's true final will has been lost or suppressed, others may come forward to prove a document in respect of which probate should be granted, those individuals having been alerted by the publication of a purported true will; and
- v. publication may give notice to those who might have a claim under the Inheritance (Provision for Family and Dependents) Act 1975.

However, despite these factors, the bar for sealing a will in England is not exceptionally high:³

Whilst the provision creates an exception to the norm, the wording of the rule does not require there to be 'exceptional' circumstances... the hurdle established by r 58, whilst requiring an applicant to make out a clear case for departing from the normal rule, is not an especially high one.

On the facts, the Court was satisfied that the "undesirable or inappropriate" hurdle imposed by rule 58 was surpassed. Not only were none of the factors in favour of the grant of probate compelling, as Mr Cowley's death had already been widely publicised and there was nothing in the will which would be of any interest to the public.⁴ But also, publication was unnecessary to trace legatees and Mr Cowley's creditors who were all already aware of his death.⁵ On the other hand, the factors in favour of sealing the will "far outweighed" those in publication, with Chancellor Flaux saying:⁶

...in particular the need to protect the applicant and those named in the will from the real risk of serious physical harm or even death because they might be thought to be guilty by association with the Deceased.

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Therefore, the Court concluded that the will's publication would be "both undesirable and inappropriate" and ordered it be sealed for the next 70 years, with it available to be inspected by those with the chancellor's consent.⁷

Analysis

As in the UK, every New Zealander has the right to access any grant of administration subject to the court's discretion, here codified in rule 5 of the Senior Courts (Access to Court Documents) Rules 2017. However the law in New Zealand imposes a stricter hurdle on those seeking to seal or redact wills, with Justice Palmer in *Deng v Ye* [2018] NZHC 928 describing the public's right to view wills as a "default right" of a "mandatory nature".⁸ His Honour went on to suggest that the contents of a will would have to be "highly sensitive or confidential" in order to justify sealing and that the power to seal wills should only be exercised with "good reason".⁹ In light of this, New Zealanders (and lawyers) should draft their wills with an awareness that the contents will become a matter of public record upon their death and consider their wording accordingly.

1. Rule 58 of the Non-Contentious Probate Rules 1987.

2. At[32]; citing *In re the Will of His Late Royal Highness The Prince Philip Duke of Edinburgh* [2021] EWHC 77(Fam) at [28].

3. At [51].

4. At [57].

5. At [58].

6. At [61].

7. At [56].

8. At [9] to [10].

9. *Ibid.*

Khawaja v Stefanova & Ors [2025] EWHC 1745

In the decision of *Khawaja v Stefanova & Ors* [2025] EWHC 1745 the English High Court expands upon the UK law on sham trusts, a complex (and vexed) area of the law.

Background

In April 2018, Ms Stefanova and Mr Khawaja met in a Harringay restaurant and verbally agreed that Mr Khawaja would become a 50% shareholder and director of DermaMed, a beauty filler supply business. However, after reaching this agreement Ms Stefanova did nothing to put it into action. Consequently, Mr Khawaja commenced proceedings seeking, inter alia, damages and specific performance from Ms Stefanova.

Eventually, Ms Stefanova agreed to Mr Khawaja becoming a director and 50% shareholder of DermaMed, which by this stage was out of business and lacking in funds.¹⁰ However, the litigation continued and by November 2022 it was clear to Ms Stefanova that she would have to pay a significant amount in damages and costs to Mr Khawaja.¹¹

On 7 December 2022, Ms Stefanova settled her flat in Highgate (**the flat**) on a trust (**the Trust**), of which she was the only trustee, for the sole benefit of her daughter, Victoria.¹² Mr Khawaja subsequently brought these proceedings, alleging that this settlement was made to prevent the recovery of damages by way of a charging order over the flat and sought a declaration from the court that the Trust was either a sham or that it should be set aside under section 423 of the Insolvency Act 1986 (**the Act**).

The decision

The High Court began by summarising the UK law on sham trusts, endorsing a statement in *JSC Mezhdunarodniy v Pugachev* [2017] EWHC 2426:¹³

...there is no such thing as a "Sham Trust": it is the document purporting to create the trust which may or may not be a sham. The essence of a sham is that the parties subjectively intended to create rights and obligations different from those appearing from the relevant documents and, in addition, they must have intended to give a false impression of those rights and obligations to third parties.

His Honour confirmed that the key enquiry concerns the subjective intention of the parties:¹⁴

...even if the [trust] deed was entered into without any dishonest or fraudulent motive but was entered into on the basis of mistaken advice, in my judgment such a transaction will still be void and therefore an unenforceable transaction if it was not intended to be acted upon but was entered into for some different or ulterior motive.

A sham requires a common intention between the settlor and the trustee and, of course, a careful analysis of the facts.¹⁵ Regarding section 423, the Act enabled the court to set aside a transaction if satisfied that it was intended to put assets beyond the reach of the person who was making a claim against them.

Therefore, as Ms Stefanova was both the trustee and the settlor, this case turned "entirely on a single issue, which is what Ms Stefanova subjectively intended to achieve by executing the Trust Deed."¹⁶ The Trust would be a sham and void if Ms Stefanova did not intend to create an effective trust for Victoria's benefit but instead made the settlement to defeat enforcement of a judgment. The Trust would fall afoul of section 423 of the Act if Ms Stefanova did intend to create an effective trust for Victoria's benefit but also intended to put the flat beyond the reach of the court (and Mr Khawaja). The Trust would be valid and unassailable if Ms Stefanova did intend to create an effective trust for Victoria and did not intend to avoid liability to Mr Khawaja.

10. At [34].

11. At [44].

12. At [1].

13. At [77]; citing *JSC Mezhdunarodniy v Pugachev* [2017] EWHC 2426 at [145].

14. At [80]; citing *Midland Bank plc v Wyatt* [1997] 1 BCLC 242.

15. At [81] to [82].

16. At [91].

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On the facts, his Honour found that the Trust deed was not a sham. Although Ms Stefanova was seriously concerned about having to pay Mr Khawaja and did want to shield the flat from him, she also had genuine concern for the welfare of her twelve-year-old daughter and wanted her to benefit from the Trust.¹⁷ The Court held:¹⁸

Ms Stefanova did subjectively intend her daughter to have an interest in the property and did intend that the Trust Deed would be effective, so as to prevent the Property from being available for enforcement by Mr Khawaja.

The Trust did, however, fall afoul of section 423 of the Act, as Ms Stefanova had also wanted to put the property out of reach of Mr Khawaja. Therefore, his Honour exercised his discretion under section 423 and declared the Trust void from the outset – resulting in the flat’s ownership being rescinded back to Ms Stefanova – and that an interim charging order for £92,586.73 (Mr Khawaja’s costs award) be placed over it.

Analysis

This decision will certainly be of interest in New Zealand given that sham trust cases are rare. Our law on shams is virtually identical to that in the UK, with our leading statement coming from the Court of Appeal in *Official Assignee v Wilson*, where Justice Chisholm said:¹⁹

A sham exists where there is an intention to conceal the true nature of a transaction...A trust will be held to be a sham where there is an intention to have an express trust in appearance only. An example is where the settlor seeks the protection offered by the pretence of there being a valid trust. A sham requires an intention to mislead.

Khawaja, and sham trust cases more generally, highlight the importance of settlors having lawful intentions. After all equity – the progenitor of trusts – is the court of conscience, and thus the courts are quick to strike down ill intended settlements for being inequitable. As the Court said in *Wilson*:²⁰

Equity looks to intent rather than form. The absence of an intention to create a genuine trust prevents the trust from being valid, because one of the essential ingredients for its creation is missing.

Section 348 of our Property Law Act 2007 is a close equivalent to section 423 of the UK Act. However, our provision is more stringent than its UK cousin, applying in more restricted circumstances and with more constrained remedies.²¹ Our courts could not, for instance, void a transaction under section 348, although they could order compensation and vest the property in another party. As *Khawaja* illustrates, a more fortified section 348 may provide an additional backstop for unconscionable settlements which do not quite equate to shams.

17. At [144] and [143].

18. At [136].

19. *Re Reynolds*; *Official Assignee v Wilson* [2008] NZCA 122, at [26]; see also *Clayton v Clayton* [Vaughan Road Property Trust] [2016] NZSC 29 and *Cooper v Pinney* [2024] NZSC 181.

20. *Ibid.*

21. See section 346 of the Property Law Act 2007.

Keir v Simms [2025] NZHC 2086

The High Court decision of *Keir v Simms* [2025] NZHC 2086 helpfully summarises the New Zealand law on constructive trusts.

Background

This case concerned a dairy farm (**the farm**) in Glenbrook, just outside of Auckland, first purchased by Bob and Lynette Simm (**the Simms**) in 1993. The plaintiffs, the Simms' daughter, Rachael and her husband, John Keir (**the Keirs**) alleged that they made two understandings with the Simms that resulted in them having a significant proprietary interest in the farm. The first arose in January 2012 when the Keirs built their home next to the Simms on the basis that the farm would, eventually, be given to them and that Rachael's brother, Bruce, would not inherit the farm. The second arose in a meeting between the Simms and the Keirs in July 2017 where it was confirmed that the farm would pass to the Keirs and that John would quit his job and contribute 20 hours of labour per week to the farm.

The dispute originated in September 2019 after the families got into an argument on the farm. As relations worsened the Keirs took various steps to try and assert their interests over the farm including placing a caveat over the property and padlocking the paddocks to deny the Simms entry. When the Simms put the farm on the market the Keirs issued proceedings as they tried to stop the sale by claiming they had a proprietary interest in the farm on the basis of either constructive trust or estoppel.

The decision

Ultimately, Justice O'Gorman held that both the 2012 and 2017 understandings were not capable of imparting a beneficial interest in the farm to the Keirs, because:

- i. during the alleged 2012 understanding, it was always made clear to the Keirs that there would be further negotiations regarding the farm;²² and
- ii. the 2017 understanding was reached in contemplation of future negotiations on key points and, the Simms maintained an intention to treat both their children fairly throughout the discussion.²³

Thus, at all times the Simms had made it clear that they intended to benefit both Rachael and her brother, Bruce, and had expressly maintained full equitable ownership and autonomy over their assets. Therefore, no beneficial interest in the farm was imparted to the Keirs. However, this decision is interesting for its conclusion for its summary on the law of constructive trusts.

Constructive trusts

Currently, the law recognises that constructive trusts may arise in this context in two different circumstances. The first is where two parties have formed a common interest to share in the beneficial ownership of the relevant property – known as a common interest constructive trust (**CICT**). The second is where one party has made contributions to property in circumstances which create a reasonable expectation that they will share in its benefits – known as a reasonable expectation constructive trust (**RECT**).²⁴ In both situations a trust will arise provided that it would be unconscionable for one party to deny the other an interest in the property. Although the distinction between the two types of trust is not always clear, the outcome it is significant, as the award for an RECT is an interest in the property strictly proportionate to the contributions made, whereas for a CICT, the award is a fulfilment of the common intention regardless of any contributions.²⁵

Justice O'Gorman summarised the law on each type of constructive trust as follows. For a CICT, the claimant must show the court that:

- i. there was an unequivocal subjective common intention, manifested in the words, conduct and 'the whole course of dealings' of the parties to share the beneficial ownership of the relevant property;²⁶
- ii. the plaintiff relied on this common intention and made contributions to the property;²⁷ and
- iii. overall, it must be unconscionable for the defendant to resile from their common intention and deny the plaintiff's beneficial interest.

22. At [215].

23. Ibid.

24. At [77].

25. Ibid.

26. At [81].

27. At [84].

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If a CICT is established, the court will fulfil the common intention even if the plaintiff's beneficial interest exceeds their contributions.²⁸ If there was no common intention regarding the size of the beneficial interest, then the court will quantify the interest by reference to the principles of proportionality and fairness.²⁹

Regarding an RECT, the claimant needs to show:³⁰

- i. direct or indirect contributions to the property;
- ii. an expectation of an interest in the property which is to be determined objectively from the surrounding circumstances;³¹
- iii. that such an expectation was reasonable as assessed from the perspective of a reasonable person standing in the plaintiff's shoes;³² and
- iv. that the defendant should reasonably expect to yield an interest in the property taking into account all the relevant circumstances.³³

If the claimant satisfies the above test, then equity will regard it as unconscionable for the other party to deny the claimant an interest in the property, and the court will recognise the RECT. The claimant's beneficial interest in the property will be 'strictly proportionate to the reasonable expectations arising from his her or their contributions.'³⁴

Analysis

The decision in *Keir* offers some useful clarification on constructive trusts, which is a complex and developing area of trust law. As with many equitable doctrines, the law ultimately focuses on the concept of unconscionability.

Postscript

To follow on from our last Private Client Briefing, Sir Anthony Mann sitting as a judge of the English High Court has upheld the first instance decision (as covered in our last briefing) in the appeal of *Marcus v Marcus* [2025] EWHC 1695 (Ch), and confirmed that the word "children" in Stuart Marcus's trust deed included stepchildren. The Judge confirmed Masters Marsh's interpretive approach emphasising that when interpreting trust deeds the court should strive to achieve a realistic construction in light with what the settlor intended at the time of settlement. As Sir Anthony said:³⁵

The relevant question is who was Stuart describing [by the word children], not what was Stuart predicting.

Therefore, the law in *Marcus* remains in line within that of New Zealand as stated by Justice Dunningham in *Re Merona Trustees Ltd*.³⁶

28. Ibid.

29. Ibid.

30. At [85] citing *Lankow v Rose*.

31. At [91].

32. At [92].

33. At [94].

34. At [95].

35. At [22].

36. *Re Merona Trustees Ltd* [2022] NZHC 1971.

Contributors:

Joanna Trezise, Priscilla Brown, Nat Walker and Tony Sycamore