

The New World of Trust Litigation

The Honourable Chief Justice of the Cayman Islands

**October 8 2009
Revised August 2011**

Introduction

This paper was prepared in response to an invitation to address the subject of “the new world of trust litigation”. The possibilities which could be explored under such a heading are endless so one must necessarily be selective. There are some aspects of the “new world” in which litigation affecting trusts will be conducted that are of significant concern to offshore practitioners and which, I hope as a judge actively engaged in the business of offshore litigation, will be an interesting focus for discussion in this paper.

Notwithstanding the remarkable success of the financial industry in overseas territories such as the Cayman Islands, even a cursory glance at the morning newspapers over the last few years, and certainly since the catastrophic economic collapse of 2008, would make it increasingly apparent that we now live and work in a “brave new world” of international regulation; one driven at least in part by the need to enlarge and protect the revenue bases of the leading economic powers and in which the onshore powers have

declared their intention to move inexorably towards a new, universal standard for automatic exchange of tax information.

The inevitability of conflict between this objective and the intended use of the offshore trust, for the protection and management of private wealth, is already apparent.

The modern offshore trust was forged by careful judicial reasoning and legislative activity. Its development has, to some extent, been influenced by the pressure caldron created over the years by the various international initiatives led by onshore regulators and revenue agencies. Initiatives which, at times, have threatened to undermine the offshore trusts industry. At times, the changes wrought by those initiatives, or the very assumptions which underlie them, have threatened to alter fundamentally the rule of law in financial regulation in the British Overseas Territories¹. On each occasion, inroads are made, and adjustments are required, but the trust concept, buffered by its ancient and extensive root system in English law, survives.

I therefore wish to consider these renewed efforts towards an international standard for transparency, which will require careful and constructive

¹ As anticipated in my paper “The Future of the Rule of Law in Financial Regulation in the Overseas Territories” 21 November 2000, delivered at the Cayman Islands Bankers’ Association Conference, November 2000. (See www.caymanjudicial-legalinfo.com.ky/publications/papers)

responses from offshore legislators and practitioners. Those responses may themselves change the context in which trust litigation takes place offshore. Ultimately, and depending on the offshore responses, in particular from the legislators; my fellow judges and I will have the task of balancing, in our discretion, the competing demands of transparency and confidentiality with the interests of the litigants before us. What then does this new regulatory climate mean for resolution of disputes and court applications affecting trusts, in particular so far as it concerns the disclosure of information relating to assets held in trusts in jurisdictions like the Cayman Islands?

The development of the offshore trust

The so called offshore jurisdictions, in spite of the common legal heritage they share with England, with each other and the other leading Commonwealth countries, are often perceived by onshore commentators as offering ‘new fangled’ and ‘illegitimate’ products for use in objectionable ways. Given the common root of the trusts law of jurisdictions like the United States, England and the British Overseas Territories, one may well ask the question whether there is any good reason for this profound skepticism on the part of some onshore regulators. Is there any good reason why offshore trusts should be viewed or treated differently than their onshore counterparts?

The trust was born in English common law and equity and the concept underwent significant changes in its infancy and adolescence in England to reflect the changing social and economic reasons for its use. To quote Maitland: *“if we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence, I cannot think that we shall have any better answer to give than this, namely the development from century to century of the trust idea”*².

However, the rapid evolution of the modern trust concept has taken place over a relatively short period of time and the pace has been led in this regard by the leading British Overseas Territories, such as the Cayman Islands, Bermuda and the BVI; as well as the Channel Islands.

English law and, with it, the concept of the trust, was imported into the British Overseas Territories on settlement which, in the case of the Cayman Islands occurred in the mid 17th century.³ As they emerged during the late 20th century as financial centres, these territories were, however, keen to set off on their own path, and it is fair to say that some distance emerged during the late 1980s and early 1990s between the English legislation and their

² Collected Papers: The Collected Papers of Frederic William Maitland, ed. H.A.L. Fisher, Cambridge, 1911, 3 Volumes, at 272.

³ The forerunner of the modern Cayman Islands trusts statute (now The Trusts Law 2009 Revision) was the Cayman Islands Trust Law 1967, which was very similar to the English Trustee Act 1925.

home grown statutory provisions which have breathed new life into the trust concept.

Professor Donovan Waters QC remarked in a paper published in the Journal of International Trust and Corporate Planning⁴ in 2006 that “...*the period from 1975 to the present day has belonged, so far as trust law is concerned, to the so-called offshore jurisdictions.*” His central thesis was that doctrinal change has been almost exclusively wrought by the offshore jurisdictions during that period. The first major change, according to Professor Waters, involved the “...*separation of beneficial enjoyment from the right to enforce trustee duties....*”, the leading example of which appears in the STAR provisions of the Cayman Islands Trusts Law, now in the 2009 Revision⁵. The second change was the implementation of “legislative provisions [designed to ensure] that a trustee only has those duties which [it] has been given by the settler”. Hence, the idea was developed that the trust deed can relieve a trustee of all responsibility for holding assets, for example for the fate of underlying companies. The clearest manifestation of this was in the VISTA legislation introduced in the BVI in 2004⁶.

⁴Waters QC, Donovan “The Future of the Trust – Part 1” [2006] JTCP 179

⁵ “Special Trusts – Alternative Regimes” Part VIII of the Trusts Law section 100 which confers the right to enforce the trusts upon persons who are appointed to enforce the trust (but who may or may not be beneficiaries).

⁶ A common law example of this arises where the trust is established for a special investment purpose through special companies for which particular expertise is required and which may not be available to the

Legislative innovation was apparent in the very early days of the development of the industry as well. In the Cayman Islands, the Fraudulent Dispositions Law 1989 replaced the Statute of Elizabeth, creating a regime for balancing legitimate asset protection objectives against creditors' rights⁷. In the same year, foreign element protection provisions were introduced into the Trusts Law⁸.

This legislative innovation has been mirrored by equally careful reinforcement by the courts, in many of the leading offshore jurisdictions, of the central principles underlying the concept of a trust. The judges in those territories face what the Cayman judiciary has described as the unique challenge of frequent examination and reinforcement of the "irreducible core" of the trust, in relation to the new and exciting ways of using them offshore. In so doing, we return inevitably to our roots in English law. The core concept of the trust has time and again been reinforced by offshore courts, applying the well known dicta of Millett LJ in Armitage v Nurse⁹ to

trustee. The responsibility for management and investment being taken by the Trust Deed from the Trustee, an indemnity may, in return be provided against liability (for mere negligent but not gross negligent breach of trust). (See for example Lemos v Coutts and others 2003 CILR 281).

⁷ For instance, by providing in section 8; that the Fraudulent Dispositions Law does not create or enable any right, claim or interest which could not be enforced on behalf of a creditor against trusts registered under Part VI of the Trusts Law (such as trusts which are used as vehicles for mutual funds).

⁸ In essence, providing (in section 93) that foreign law or a foreign judgment shall not be recognised, enforced or give rise to an estoppel insofar as it is inconsistent with other provisions of the Law which ensure that Cayman Islands law shall govern trusts which are domiciled there.

⁹ [1998] Ch 241. (See as example of its application by the Cayman Courts Lemos v Coutts (above)).

the effect that “*there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust*”. That principle, based as it is on an understanding of the trust as an idea underpinned by what are essentially moral obligations – those of the trustee to its beneficiaries – and enforceable by them, re-traces the origin of the trust as a development and extension of the “use”.

Professor Waters and others have provided us with fascinating explorations of the history of the development of the trust, noting, for example that “*The common law system’s trust has its origin around the middle of the fourteenth century, when the medieval Lord Chancellors began to enforce a ‘use’ against the transferee...*”.¹⁰

Notwithstanding this common heritage, rooted in English law, and shared not only with the mother country but also with the United States of America; onshore regulators and revenue agencies at regular intervals - motivated by the domestic concerns of the leading economic powers - seek to impose measures which threaten to erode the concept of the trust entirely; proceeding, as many of them appear to do, upon a presumption that all offshore transactions are illegitimate until proven to be legitimate. It is

¹⁰ Waters QC, the Journal of International Trust and Corporate Planning [2007]
See also Prof. John Langbein: The Secret Life of the trust: The Trust as an instrument of Commerce, The Yale Law School Legal Scholarship Repository. January 1997.

indeed ironic that a legal tool developed in order to bind the conscience of those who had taken property to hold for the benefit of others, could now be presumed to be devoid of substance *until proven otherwise*.

International regulatory initiatives

Let me begin by highlighting some of the various international initiatives with which we are concerned, before moving on to consider some of the case law.

In the United States, as we are all now well aware, there have been various congressional initiatives, in particular the Stop Tax Haven Abuse Act, on which President Obama campaigned and which has been re-introduced as a Bill in Congress this year. It establishes presumptions relating to offshore entities, many of which fly in the face of the legal principles actually applicable to those entities in the governing jurisdictions. One of the proposed provisions of the statute, for example, would mean that all powers and interests held by protectors of foreign trusts, should be attributed to the US grantor. Another aspect of the bill is the provision that “if in a tax proceeding a US person directly or indirectly formed, transferred assets to,

and was a beneficiary of, or received distributions from an [offshore] entity, it will be presumed that the person exercised control over the entity”.¹¹

It is to be assumed that the presumptions would only be rebutted by adjudication by the US revenue authorities or courts. The Bill appears to require information exchange protocols geared towards automatic exchange of information in order for a territory’s information exchange practices to be deemed effective. For those purposes, it identifies 24 “Offshore Secrecy Jurisdictions”; including all the major offshore financial centers, as “probable locations for U.S. tax evasion.”

The fate of the bill, of course, remains to be seen, but it is exemplary of the current onshore attitude.¹² First, the presumption is that the offshore transaction or structure is controlled and/or owned beneficially by the domestic taxpayer. Second, the assumption is also one of illegitimacy until proven otherwise and the issue of legitimacy is expected to be adjudicated upon within the taxing jurisdiction. Finally, on the basis of these assumptions, a framework for almost wholesale exchange of otherwise

¹¹ Bruce Zagaris “International Financial Regulatory Initiatives: The Challenges and Prospects for Practitioners and International Financial Centres” and Summary of the Stop Tax Haven Abuse Act published by co-sponsor of the Bill Senator Carl Levin:
[www.http://Levin.Senate.gov/newsroom/release.cfm?id:308949](http://Levin.Senate.gov/newsroom/release.cfm?id:308949)

¹² As exemplified also by the OECD and EU Tax Harmonisation initiatives which contain similar presumptive provisions aimed at justifying demands upon the offshore territories for automatic disclosure. The Stop Tax Haven Abuse Bill has passed through the U.S. Senate and was introduced in the House of Representatives on 29 July 2011, with every indication that it will pass into law (especially given the urgency of the “deficit reduction” agenda).

confidential information must be erected in return for reduced scrutiny of transactions and in order to avoid negative publicity and even the imposition of financial sanctions such as those already enabled by the so-called “Patriot Act” (31 U.S.C. 5318 (a)). The tendency to merge anti-money laundering and anti-terrorism efforts with these efforts, is another manifestation of the attitude of presumed illegitimacy adopted against offshore structures.

The Bill has not received universal acclaim. A typically objective criticism appears in the *Minnesota Journal of International Law*: *“In the event of its passage, the Stop Tax Haven Abuse Act will fail to eliminate tax havens and foreign tax evasion. The Act is not geared toward international co-operation. Instead, it uses a “name and shame” strategy, which other countries have an incentive to oppose.*

Fortunately, alternative mechanisms for the exchange of international tax information exist, such as an international tax authority with domestic enforcement powers....These alternatives take into account the needs of tax haven jurisdictions and therefore are more likely to promote international co-operation. ¹³

¹³ Anthony D. Todero; The Stop Tax Haven Abuse Act: A Unilateral Solution to a Multilateral Problem; 19 Minn. J. Int'l L. 241 (2010).

Confidentiality and information exchange

I wish to say something about duties of confidentiality owed by trustees and others who come into contact with trust structures, one of the key areas in respect of which I suspect, especially because of the international initiatives, there will be challenges and difficult questions arising in the “new world of trust litigation”.

The first wave of litigation – now diminished – that affected Cayman Islands trusts in the late 80s and early 90s, arose from attacks from foreign quarters as a result of forced heirship or other claims, or in an attempt to enforce foreign orders. The challenge of the next decade is likely to be the need “*to strike the balance between the legitimate objectives of claimants and of the global initiatives against serious crimes, while at the same time protecting the legitimate interests of beneficiaries of valid Cayman Islands trusts, as well as those of innocent third parties*”¹⁴. In other words and it is self-evident; a balance needs to be struck and maintained between the rights of the client to confidentiality and the needs of law enforcement and regulators for access to information.

¹⁴ See footnote 1 above.

More than ten years ago, in its 1998 Report¹⁵, the OECD proposed that: *“Ideally, all Member countries (and by extension tax havens) should permit tax authorities to have access to bank information, directly or indirectly, for all tax purposes so that tax authorities can fully discharge their revenue raising responsibilities and engage in effective exchanges of information”* (emphasis added).

This proposal would make all claims to legitimate confidentiality redundant as it would allow the tax regulators to have unrestricted access to confidential information without the need first to show that there is a reasonable basis for believing that a tax crime had been committed.

At the time¹⁶, I made the following remark: *“This refusal to acknowledge the distinction between criminal (tax evasion) and morally wrong conduct on the one hand and conduct which is legal, economically advisable and often desirable on the other, is a clear danger sign for the future. From the legal and jurisprudential point of view, the implications are very far-reaching. Most fundamentally, if the prima facie showing of a (tax) crime is no longer to be required, then on what proper basis can the proposed invasion of privacy be justified?”*

¹⁵ Entitled: “Harmful Tax Competition; an emerging global issue”
www.oecd.org/dataoecd/33/0/1904176.pdf.

¹⁶ See footnote 1 above, at page 9.

Transparency was one of the key issues on the agenda at the G20 London summit in April and at their follow up meeting in Pittsburgh in September 2009. Immediately following the London summit, the OECD published its “Progress Report” on 82 financial centres (“the OECD report”) in which it assessed their progress towards achieving the new international standard. Achievement of the highest tier of the list (the so-called “White List”) was dependent on the number of Tax Information Exchange Agreements (“TIEAs”) which a financial centre had concluded prior to the Summit. The “Blacklist”, which was notably described by one commentator as “the world’s shortest black list”¹⁷ is now empty. By August, within months of the publication of the OECD report, the Cayman Islands and the BVI had been elevated to the White List as a result of having concluded the requisite number of TIEAs.

The somewhat arbitrary set of criteria on which the OECD Report was formulated did not examine the implementation of existing disclosure provisions or mechanisms; or the adequacy of legal gateways to information

¹⁷ Neubacher, Alexander “Why the Fight Against Tax Havens is a Sham” published online at Speigal Online International 11 April 2009. A thesis made all the more relevant by dishonest commentary of the kind purveyed by the likes of John Moscow in his testimony to the U.S. Congress House Committee on Offshore Banking Corruption and Terrorism. There Moscow misrepresents the meaning and effect of the important decision of the Cayman Islands Grand Court in *Re Ansbacher* (below). (see http://commdocs.house.gov/committees/intrel/hfa26777.000/hfa26777_of.htm) at Moscow 118.

which were already available in the centres concerned. There was no review of existing jurisprudence or the legislative framework, other than the number of TIEAs implemented. Perhaps it is not too much to expect that meaningful scrutiny will come with other progress reports in the future.

The first point to note when considering the implications of all of this for the development of the law within the territories affected is, of course, the history of private client confidentiality, as it has developed in English law – the legal system that anchors that of the overseas territories.

Duties of confidentiality, as part and parcel of the duties of loyalty and good faith, are necessary incidents of a fiduciary relationship, a relationship established by duties which come from the wellspring of equity; from the obligations, policed by the courts of equity, to hold identified property for the benefit of others. These obligations, forming part of the moral code which governs fiduciaries, are the hallmarks of personal relationships of “trust and confidence”, underpinned by the solemn obligation of the professional or entrusted person to respect the privacy of those whose interests he must protect. This is an idea with deep roots in the common law of both England and the United States of America.

Indeed, until recently, the information concerning the property itself could be seen as part of the fund in question, to which the beneficiaries of the arrangement in question had proprietary rights which could not be usurped any more than their rights to the beneficial enjoyment of the property in question could be usurped. To do so would be a fundamental breach of duty¹⁸.

The law has developed so as to move away from the idea that there are proprietary rights in trust documents and towards the view, expressed by the Privy Council in Schmidt v Rosewood [2003] 2 AC 709 that:

“...the more principled and correct approach is to regard the right to seek disclosure of documents as one aspect of the court’s inherent jurisdiction to supervise, and if necessary intervene in, the administration of trusts. The right to seek the court’s intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he

¹⁸ O’Rourke v Darbishire [1920] A.C. 851 and Butt v Kelson [1952] Ch. 197; In Re Ojje Trust 1993 CILR 348.

may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion”.

Courts throughout the Commonwealth are familiar with the balancing exercise required in discharging this role. To quote again from the decision in Schmidt v Rosewood:

“Especially where there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary...may be an important part of the balancing exercise which the court has to perform on the materials before it.”

Since at least the early nineties, in cases before the Cayman Courts dealing with applications for the disclosure of trust information, the Courts have conducted the kind of balancing exercise envisaged by the Privy Council in that later case.

The public policy considerations which come into play when considering the wider disclosure of trust information (or other confidential information

exchanged in the course of a professional or fiduciary relationship) have also been given extensive judicial consideration.

The widely accepted common law principle that the trustee (or any fiduciary), concomitant with his or her duties of loyalty, owes a duty not to divulge confidential information has, as one would expect, informed the judicial approach to these questions of disclosure. In the case of Re *Ansbacher (Cayman) Ltd* [2001] CILR 214, the principle was affirmed in these terms; a request for confidential information from the Irish authorities being, at that stage, patently based upon nothing more than an unsubstantiated presumption of wrongdoing:

“One principle has, however, always remained constant here, as it has in all countries which share our common law heritage: the law is not premised upon any presumption of wrongdoing...it follows that this court must stand ready the more so to reject any request for disclosure which may proceed upon a presumption that the mere fact of doing business with a Cayman financial institution points to some reproachable objective such as tax evasion”.

Nor is confidentiality necessarily anathema to good regulatory practices or international exchange of information. As Mr Gabriel Makhlouf¹⁹ stated in his announcement of the then highly controversial OECD Report on Access to Bank Information for Tax Purposes: “...this Report is quite explicit in recognizing the legitimate role that bank secrecy plays in protecting the confidentiality of financial affairs and the soundness of financial systems”.

The traditional basis for disclosing private client information is the suspicion or proof of the commission of a crime or breach of fiduciary duty. Where that information is to be provided in the absence of any such allegation, standards will be new and must be carefully elaborated. New legislation (such as we have seen with the “Patriot Act” and proposed Tax Haven Abuse Act) will no doubt emerge which require scrutiny and interpretation by the offshore courts, balancing the public policy concerns and considerations.

In the Cayman Islands, the Confidential Relationships (Preservation) Law (1995 Revision) (“the CR(P)L”) sets out comprehensive provisions for the protection of confidentiality and for the disclosure of confidential information in appropriate circumstances. It is a statute which has now been

¹⁹ Chairman of the Committee of Fiscal Affairs of the OECD; 12 April 2000

qualified in many instances by the passage of subsequent legislation which provide for disclosure of confidential information in keeping with the Islands' international obligations. In this context, it is worth noting the Tax Information Authority Law. This is legislation which has been enacted specifically to enable the implementation of the Islands' various treaty obligations for the exchange of tax information. In light of the persistent criticisms emanating from some of the G20 Governments, including in particular the United States and our own right here in the United Kingdom; one might well be surprised to learn that among these treaties executed by the Cayman Islands are several with the United States, the U.K. and much of the rest of the European Union.

The treatment of cases under the CRPL has been consistent and has, notwithstanding the advent of the tax treaties, reflected the type of balancing exercise in which courts are frequently engaged when adjudicating upon claims to confidentiality. In **In Re Ansbacher** (above), I made the following remarks:

“While the confidential information about the affairs of persons doing business in and from the Islands is required to be protected, the protection afforded by the Law is not absolute.

Disclosure will be allowed where appropriate to ensure that justice is done in disputes between persons and where the enforcement of the criminal law and the administration of justice – whether here or overseas – requires that disclosure be allowed...the disclosure of confidential information has been allowed and directed by this court in numerous cases, involving many different countries and many different legal issues and circumstances...”.

There is also, however, the difficulty presented by the conflict of laws. This conflict is likely to present unique challenges in the future, with the stated intention of many of the “onshore” regulators to assert jurisdiction over disputes concerning the validity or effect of the structures concerned.

In the case of **Re: H 1996 CILR 237**, the central question was whether the assets of a Cayman domiciled trust should be available to a U.S. Court appointed trustee in bankruptcy of the settlor, even though they had been settled upon trust long before any event of bankruptcy occurred. The trust was a discretionary trust for the benefit of the settlor’s family. The trustee was required on pain of penalty by the U.S. Grand Jury to disclose all information about the assets of the

trust and applied to the Court in Cayman, where the law governed the trust, for directions. Directions for disclosure were refused on the basis that the presumption of continuing ownership of the trust assets by the settlor – the presumption that underpinned the Grand Jury’s subpoena – was inconsistent with the contrary position under Cayman law. My understanding of the outcome is that the action in the U.S. Court against the Cayman Trust assets was not pursued. That was not surprising, as the case ***In Re H*** was decided on principles already well settled as a matter of both English and American law (see ***XAG v A Bank***) [1983] 2 All. E.R. 64.

I remarked (at page 244 of the Report) that “*If validly constituted, the trust must be regarded as holding property independently of its settlor. That pivotal issue of validity remains to be decided...as a matter of Cayman law, which governs the trust. While that pivotal issue remains to be decided... it would be contrary to public policy and an unwarranted negation of the applicant’s duty of confidentiality owed as trustee, to direct that he should give into evidence confidential information in (foreign) criminal proceedings which, as a matter of Cayman law, may yet come to be regarded as misconceived*” [(premised as they were on the notion of the continuing ownership of the trust assets by the settlor)].

Validity and the Conflict of laws

Common to many of the TIEAs, are provisions which require that trust information be amenable to requests made by tax authorities pursuant to the TIEAs²⁰.

Fueled by such provisions, and given the jurisprudential mismatch already emerging from the treatment of offshore trusts as mere “grantor” trusts, with their assets regarded as still being the assets of the grantors; conflict of laws issues over the validity of offshore trusts are only likely to escalate in the future.

Indeed, we see from the Stop Tax Haven Abuse Act, that the presumption of continuing ownership of offshore trust assets by their grantors, is said to be among the presumptions which are “needed in civil, judicial and administrative proceedings” because the tax, corporate, or bank secrecy laws and practices of these jurisdictions make it “nearly impossible for U.S. authorities to gain access to needed information”.²¹

Anyone having the faintest acquaintance with the factual realities would, of course, recognise the obvious hyperbole in that statement. Regrettably however, the language nonetheless foreshadows attempts to use the

²⁰ See, for example, the TIEA between the United States of America and the Cayman Islands, struck on 27 November 2001.

²¹ Taken from the Levin Summary of the Stop Tax Haven Abuse Act (op. cit) (above).

American judicial system to compel disclosure on the basis of what one might term a “presumption of irregularity”²²

Other G20 members, including the authorities of Civil law jurisdictions where the trust concept is not recognised to begin with, are not likely to be any less inclined to disregard trust settlements for taxation purposes.

Where such conflict of laws issues arise based on nothing more than a presumption of irregularity; it should not be difficult to predict what the response of the Courts of the offshore jurisdictions would be. The response is already foretold in the case laws, if cases such as ***In R H*** and those upon which it relied are a measure to go by.

But, ironically, the appropriate response is perhaps also already well recognised in American jurisprudence, if the following excerpt from Prof. Mann²³ written as long ago as 1964 is any measure to go by:

“In those cases in which the enforcing state asserts a prerogative right and demands obedience to it abroad, an additional point of some significance is available. The enforcing state...cannot achieve respect for its prerogative rights in foreign countries by proceedings taken there. It is

²² An attitude which seems to have propelled the efforts of HMG IRC as well towards the “Offshore Disclosure Facilities” issued in 2007 and renewed in March 2009 by the IRC with notable success.

²³ The well known United States legal academic writer; taken from an article published (1964) III Hague Recueil 146.

precluded, a fortiori, from achieving its ends indirectly by having orders made in its own territory, which are to take effect abroad and thus attribute to themselves a power equal to that of an order which the foreign country could, but refuses to make. The crux of the matter lies in the fact that the enforcing state requires compliance with its sovereign commands in foreign countries where its writ does not run and where it cannot be made to run by clothing it into the form of judgments of courts, whether they be its own or those of the foreign country.”

Conclusion

In conclusion, I think I can safely and fairly end with the following remarks.

While the trust concept remains an important tool for the protection and management of assets in the offshore world as it remains say, in City London or New York; the Courts do not regard the confidentiality of trust information as absolute. Far from it, as the decided cases show. Indeed, as the case law evolves, the Courts have shown their willingness to develop the common law to ensure that the trust is not abused for unlawful and unjust purposes.

Witness, for instance some of the cases listed on the agenda of this very Conference for discussion. I have in mind, for instance, the case of

Mubarak v Mubarak [2008] JRC 138 in which the Jersey Court distinguished between the “variation” of a trust and its “alteration”, such that an order made for ancillary relief in divorce proceedings in England could be and was enforced against the trust with the consent of all the beneficiaries; adopting a broad interpretation of the rule in *Saunders v Vautier (1841) 4 Beav 115* by which beneficiaries acting together, may alter the terms.

Another recent example, coming from my own jurisdiction of the Cayman Islands; involved the appointment of a receiver by way of equitable execution over a power of revocation retained by the settlor of a trust, such that the power was treated as his property and when vested in the receiver, allowed the receiver to revoke the trust and take its assets to enforce a monetary judgment awarded against the settlor in Turkey in favour of the Turkish Government banking regulator. This was the final outcome following a judgment by the Judicial Committee of the Privy Council (21 June 2011) explaining and expanding the reach of the common law to the effect that a purely personal power of revocation of a trust (ie: one to which no fiduciary obligation attaches) can be tantamount to outright ownership of the trust assets of a validly constituted trust and can be treated as the property of the holder of the power, for the purposes of the appointment of a

receiver by way of equitable execution over it as part of his property, where the interests of justice so require. The Privy Council invoked the broad equitable powers to grant injunctive relief and to appoint receivers vested in the Courts, now expressed in the Supreme Court Act 1981, Section 37, where it appears “*just and convenient*” to do so.

By its decision, in particular treating the power of revocation as “property” over which a receiver can be appointed, the Privy Council observed the “incremental advancement of the law”, in a way that the Courts below felt was best left to the legislature.²⁴

Another important concern which had been earlier raised in the Court of appeal was that by appointing an equitable receiver at the instance of the Turkish banking regulator by way of enforcing its judgment, the Court would be preferring one creditor over others who may have claims against the assets of the Settlor – a Mr. Demirel – who had been ordered bankrupt in Turkey. The Privy Council overcame that concern by the acceptance of the undertaking given by the banking regulator that it would allow trust assets recovered to be treated as part of Demirel’s bankruptcy estate and so amenable to all proper creditor claims.

²⁴ *TMSF v Demirel* 2009 CILR 324 (where the plaintiff was unable to assert a proprietary or tracing claim against the trust assets or that the trust should be set aside on the basis of fraudulent disposition into it or as being a “sham”). Upheld on Appeal by the Cayman Islands Court of Appeal: 2009 CILR 474. The Privy Council decision: [2011] UKPC 17.

Novel and far-reaching though its conclusions are, they are resonant of the outcome in an earlier Privy Council judgment from the Cayman Islands jurisdiction. In that case, discretionary trusts settled by Sheikh Fahad Al Sabah, a member of the Kuwaiti royal family who had been ordered bankrupt by judgment of the Bahamian Court (the Court of his chosen domicile), were found to be amenable to bankruptcy enforcement proceedings taken in the Cayman Islands by his trustee-in-bankruptcy. The assets of the trusts were eventually (by further orders made by the Cayman Court) surrendered to the trustee-in-bankruptcy on the basis that they had been fraudulently disposed into the trusts and were traceable to the proceeds of fraud committed against the Kuwaiti Government. The Kuwaiti Government had petitioned for the making of the bankruptcy order based on a judgment it had obtained in the amount of USD800 million on account of Al Sabah's fraud.²⁵

Viewed objectively, such expository developments in the case law as explained in these Privy Council judgments, state volumes about the recognition by the offshore jurisdictions of the responsible role they must play in the interests of the administration of justice and in the maintenance of stable national and international financial systems.

²⁵ *In Re Al Sabah* 2004-05 CILR 373 P.C.

But the other side of the equation must be understood and appreciated by the regulators in the so-called on-shore jurisdictions: the legal and judicial systems of the offshore jurisdictions are based on foundations of equal rectitude, venerability and transparency.

However grudgingly, this reality is being more and more accepted by the G20 Governments: witness for instance, the recent admission to membership of the Cayman Islands to the OECD Steering Committee for the implementation of TIEAs – the very body which only weeks before was determined to black-list that country.²⁶

The price of admission was doubtless compliance with the G20 demands for subscription to the minimal member of TIEAs. But that sort of *quid pro quo* is nothing new. Many of the offshore jurisdictions have the most rigid anti-money laundering regimes in the world and by which they have been able to secure their positions on other much vaunted “white lists” of the FATF and OECD.

Yet the disparaging rhetoric continues and the goalposts continue to shift.

²⁶ www.caymanfinance.gov.ky/pls/portal/url/page/pruhome/pressroom/2009/oecdsteering

In this seemingly endless skirmishing over fiscal sovereignty, it will be interesting to see how the Courts respond both in the “offshore” and “onshore” world, to the emerging assault upon the trust concept.

Hon. Anthony Smellie
Chief Justice

October 8 2009