

**FORM AND SUBSTANCE:
THE CAYMAN ISLANDS PERSPECTIVE
IN THE DEBATE ABOUT OFFSHORE TRUSTS**

**PRESENTATION TO THE
TRUSTS AND ESTATES LITIGATION FORUM
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by

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CHIEF JUSTICE**

Introduction

1. [Chief Justice's introductory remarks]
2. Professor Austin Scott's seminal textbook on trusts law¹ opens with the following quote from Maitland: *The trust "is an institute of great elasticity and generality: as elastic, as general as contract"*. Indeed, an express trust is largely what the draftsman makes of it, so long as his purpose is not illegal, and to the extent constrained by public policy. This elastic concept has, over the past three decades, stretched to a variety of innovative uses in the private and commercial context so that the trust, and the manner of its evolution, is an emblem of the fluidity of English law.
3. Offshore legislation seeks to keep pace with demand in many of the key jurisdictions by a clear and deliberate policy of adapting the structure to fit the need. As a result, the legitimate uses of offshore trusts for estate preservation and planning, led to a legislative agenda which was designed to ensure that each jurisdiction offered the most attractive options for meeting

¹ Edited by William Fratcher

those objectives. In the Cayman Islands, for example, a period of almost constant legislative innovation in the early to mid 1990's saw the introduction of statutory provisions for reserved powers, for presumptions of immediate and lifetime effect and for the statutory validation of non-charitable purpose trusts, among other advances. All of these have since become common features of the leading offshore jurisdictions. Most offshore commentators have argued that this innovation was essential for the survival of the industry after the tax authorities in the US, UK and other commonwealth countries "slammed the doors shut" (in the words of Anton Duckworth in the early 90's) against the offshore trust. The results are instruments of great utility and flexibility but which are nonetheless recognisable as trusts by any lawyer from a common law jurisdiction.

4. There are other credible reasons which are cited by settlors (often in their evidence to the courts) for the establishment of trusts offshore: concerns about privacy and personal security; a desire to fulfil charitable intentions; legitimate tax avoidance objectives devised after receiving the best professional advice and the wish to mitigate the often iniquitous effect of forced heirship laws; to name but a few. The many innovative commercial uses which have been developed have been given statutory life in, for example, the STAR legislation in the Cayman Islands and the unit trust structures which are popular for establishing mutual funds.²
5. The *raison d'etre* of the offshore trust industry was summed up by Lord Walker in the Privy Council in ***Schmidt v Rosewood* [2003] U.K. PC 26** in this way:

² Professor John Langbein of Yale Law School estimates that 90% of trusts in the United States of America are "commercial" [citation]

"These territories (sometimes called tax havens) are chosen not for their geographical convenience ...but because they are supposed to offer special advantages in terms of confidentiality and protection from fiscal demands (and, sometimes from problems under the insolvency laws, or laws restricting freedom of testamentary dispositions, in the country of the settlor's domicile.)"

6. My sister judge, Mrs Justice Levers, in addressing an ACTAPS lunchtime seminar on 19 March 2007, commented on the challenge faced by offshore judges in the face of these developments. As she observed,

"What [Professor David Hayton] terms the 'facilitative liberal laissez faire approach of English law' has of course been imported to the overseas territories, where legislators in jurisdictions like the Cayman Islands attempt to extend and enhance the facilitative framework with the introduction of concepts like the express statutory validation of reserved powers and non-charitable purpose trusts. This framework presents the offshore judges with the unique challenge of frequent examination and reinforcement of the irreducible core [of the trust] in relation to these new and exciting ways of using trusts".

The judiciary must, in other words, keep pace with the rapid development of the complicated structures which grow on this fertile soil.

7. Despite this mature, deliberative and sophisticated context, some onshore detractors criticise the offshore trust as a triumph of form over substance. I

started this talk by quoting Professor Scott. In the opening paragraphs of his textbook, to which I referred earlier, he goes on to say that

"There is, to be sure, a darker side of the picture. The trust has often served as a means of evading the law.[and] It has been said that "A trust is altogether the same that an use was... they have the same parents, fraud and fear; and the same nurse, a court of conscience". This 'dark' side sometimes dominates the way in which offshore trusts are perceived and described onshore. However, from the Cayman Islands' perspective, the chorus of criticism, on close examination, will be found to be baseless. The central proposition of this talk is that the trust, in the Cayman Islands, has been a triumph of form and substance; that the cutting edge legislative developments find a solid foundation in the jurisprudence of the Islands.

8. I will begin by reviewing some of the ways in which this onshore scepticism has recently manifested itself and will then turn to exploring the case law, focusing in particular on decisions of the Cayman Islands courts, which reveal the doubters to be entirely misguided, with particular reference to the approach to disclosure of information , and the likely judicial approach to assessing the validity of the trust.

Onshore scepticism – the legislators

9. Let me start by highlighting the most recent, explicit and focused attacks. The US Senate's Permanent Subcommittee on Investigations of the Committee on Homeland Security and Government Affairs, produced a 397-page report entitled "Tax Haven Abuses: The Enablers, the Tools and

Secrecy" in conjunction with hearings the Committee held on 1 August 2006. Following the publication of the report, the New York Times quoted Senator Carl Levin, the author of the report, as saying that the law "should assume that any transaction in a tax haven is a sham". He was also quoted (in the online tax-news.com) as saying that "Our investigation blows the lid off tax haven abuse[r]s that use sham trusts, shell corporations and fake economic transactions to hide the fact that US citizens are controlling offshore assets, circumventing US legal requirements, and dodging taxes".

10. The "findings" contained in the report reflect this very broad approach. For example, the report makes the following bold and sweeping conclusions:
 - (i) That offshore 'service providers' in tax havens use trustees, directors and officers who comply with client directions when managing offshore trusts or shell corporations established by those clients; and that the offshore trusts and shell corporations do not act independently;
 - (ii) Further, that corporate and financial secrecy laws and practices in offshore tax havens make it easy to conceal and obscure the economic realities underlying a great number of financial transactions, with unfair results under U.S. tax and securities laws.
11. Following on from these conclusions, the report recommends, among other things, that:
 - (i) US tax laws should include a presumption that offshore trusts and shell corporations are under the control of the US persons

supplying or directing the use of the offshore assets, where they are located in a jurisdiction designated as a "tax haven"; and that

- (ii) An offshore trust or shell corporation related to a director, officer or large shareholder of a US publicly traded corporation should be required to be treated as an affiliate of that corporation, even if the entity is allegedly independent.

12. In February 2007, Senator Barack Obama threw his weight behind the Subcommittee's proposal for a "Stop Tax Haven Abuse" Act. The list of 34 proposed "Offshore Secrecy Jurisdictions" includes the Cayman Islands, Switzerland, Hong Kong, Singapore and Luxembourg. 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. The clear intent is to undercut the foundations of the offshore financial industry, including the efficacy of offshore trusts.
13. This is not, however, just a newly emergent threat. Legislation which has already been enacted in both the United Kingdom and the United States in recent years, has also clearly been aimed at reducing opportunities for residents or domiciliaries of those countries to make use of offshore trusts for tax planning purposes. For example, the proposed new rules for non-domiciled UK residents, as I understand it, seek to levy capital gains tax on beneficiaries receiving capital distributions or benefits from an offshore trust; whether or not they are non-UK domiciled and whether or not the benefit is received in the UK.

Onshore scepticism – the courts

14. Nor is the scepticism restricted to the legislators. In the United States, judicial scorn has been poured most often in the context of actions taken before the Courts by regulators or by the Internal Revenue Service, or in bankruptcy proceedings. However, the cases which have drawn the most attention, on closer inspection, are found to have turned on peculiar facts which one would expect to be absent in well run structures and which, on their own facts, may have yielded no different results if decided offshore.
15. Many offshore lawyers are familiar with *FTC v Affordable Media*³, decided in 1999, in which the Andersons were imprisoned for contempt after they claimed they could not comply with a repatriation order to bring back assets they had settled on a Cook Islands trust. That decision was made in the context of a claim by the US Federal Trade Commission for alleged fraud in relation to a telemarketing scheme. The court held that the alleged impossibility of complying with the repatriation order was "self-created". *Eulich v US (2004)*⁴ is a more recent example. Mr Eulich was investigated by the IRS. He refused to provide documents relating to a Bahamian trust, which he had settled (claiming he had no control over them). Mr. Eulich was found to be in contempt also on the basis that his defence of impossibility was in fact "self-created".
16. In 1988 *In re Stephen J Lawrence* 227 B.R. 907 (Bkrcty.S.D.Fla. 09/23/1998), Mr Lawrence was imprisoned by the US bankruptcy court when

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he refused to turn over the assets in an offshore trust he had settled. One of the salient facts of the case was that Mr Lawrence had settled the trust *after* an arbitration award had been made against him in the amount of US\$20 million and the judge in the case described Mr Lawrence as having "lied through his teeth...".

17. Respected US commentators have pointed out that these were not novel decisions, but entirely in accordance with "time-tested and true principles of contempt law"⁵.

A question of control?

18. Given the common root of the trusts law of jurisdictions like the US, England and by extension, the Cayman Islands; one may well ask the question whether there is any tension at all between the principles which are applicable. Cayman trust law, of course, derives from English common law and equity. The core concept of the "trust" has time and again been reinforced by our local courts, applying the well known dicta of Millett LJ in *Armitage v Nurse*⁶ to 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*", namely the duty of the trustee to perform the trust honestly and in good faith for the benefit of the beneficiaries. And even with regard to many of the statutory initiatives, one does not have to look far to find common ground. Cayman's legislators, for example, drew inspiration from the New York Estates, Powers and Trusts

⁵ Barry Engels: The Eulich Impact on Contempt of Court principles and APTs, Trusts and Trustees, 2004, Vol 11, Issue 1

⁶ *Armitage v. Nurse*, [1998] Ch. 241

Law, when formulating the foreign element provisions in the Cayman Islands Trusts Law (now in the 2007 Revision).

19. In addition, and as one would expect, the asset protection initiatives which have been taken; have been counter-balanced with measures designed to ensure the legitimacy of the jurisdiction. Hence, the Fraudulent Dispositions Law 1989 provides that every disposition of property made with an intent to defraud and at an undervalue shall be voidable, within 6 years of the disposition, at the instance of a creditor thereby prejudiced. Under the Bankruptcy Law (1997 Revision), if the settlor of a trust commits an act of bankruptcy within the Cayman Islands, he may be made bankrupt within 6 months and transactions at an undervalue can be set aside by the trustee in bankruptcy if they occurred within a prior period of up to 10 years.⁷
20. Thus, commentators have pointed out that "*the Caymanian approach is underpinned by the notion that it is sensible and appropriate to aim to achieve a compromise between, on the one hand, the rights of an individual to protect his assets [(from future attacks)] and, on the other, the rights of legitimate creditors to pursue their claims. This requires the legislators and the judiciary (in interpreting and applying the legislation) to achieve a fine balance between these competing imperatives. The objectives of international crime fighting and anti-money laundering initiatives also have to be put in the scales.*"⁸
21. Perhaps the issue is one of control. By this I mean both the resolution of the inevitable conflicts of law issues that will arise when grappling with

⁷ The avoidance provision can be invoked within the extended ten year period if the beneficiaries are unable to prove that, at the time of settling the trust, the settlor was unable to pay his debts from his remaining assets.

⁸ Collins, A Fine Balance, Cayman Financial Review, August 2007

problems affecting offshore trusts, as well as control in relation to the internal administration of the trust itself and the extent to which this has been and should be removed from the settlor and subjected to external regulation. In the US, for example, one can see that the tension arises between the historic focus of the US tax laws on control as the test for liability to tax juxtaposed against the ease with which settlors of offshore trusts can exert some control through the mechanism of protectors and/or management committees to whom extensive powers are granted or through whom extensive powers are reserved. This, at the same time as the settlors divesting themselves in law of ownership and control of the assets settled in trust. In the matrimonial cases in the United Kingdom, the issues may ultimately boil down to a test which seeks to ascertain the level of that kind of "control" and thus making it justifiable to treat the trust assets as resources available to the husband.

22. Some of these are matters which have yet to be ventilated in the Cayman courts and I would not wish to be thought to be pre-judging them here. However, it is clear from the wealth of jurisprudence in relation to the Caymanian response to other forms of attack, that there are already some guiding principles which might inform the response.
23. First, the foreign element protection which is incorporated into the Cayman Islands statute will no doubt be relied on and will be given effect by the Cayman courts. Questions concerning the validity of a Cayman Islands trust *or* the interpretation or effect of it, are to be determined according to Cayman Islands law. Foreign law in relation to the validity of the trust, will not invalidate a Cayman law trust.

24. A few clear examples of the judicial approach emerged during the 1990's. Then we saw a wave of litigation – some might say mercifully now diminished – arising from attacks on Cayman Islands trusts from foreign quarters as a result of forced heirship or other claims, or in an attempt to enforce foreign orders. ***In Re Lemos (1992-93 CILR 460)***, for example, certain beneficiaries had commenced proceedings in Greece challenging the validity of the Cayman trust under the forced heirship rules, and seeking to have it set aside. This was contemporaneous with proceedings brought in Cayman alleging breach of trust. The then Chief Justice Malone pointed out that the objective of the Greek proceedings would be *"unlikely to succeed [in Cayman] because of the provisions of the Trusts Foreign Element Law"*. Ultimately, the Court of Appeal ruled that disclosure of documents to the beneficiaries who were party to the Greek challenge could be limited; that there might be documents or categories of documents which it would be just and proper to exclude from the ambit of disclosure, and that the Court could and would require undertakings from the beneficiaries concerned, that the information disclosed would be used only in relation to the breach of trust action before the Cayman courts and not in relation to the Greek proceedings. Although this case was decided ten years before *Schmidt v Rosewood*, the approach taken by the Caymanian courts in many ways foreshadowed the guidance which would ultimately be laid down by the Privy Council in that case.
25. ***In Re Ojeh 1992-1993 CILR 348***, the Trustee of a Cayman trust applied for directions concerning French proceedings involving the trust. The settlor's widow, who resided in France, had challenged the administration of the trust on her own behalf and on behalf of her minor son. She obtained orders in

French guardianship proceedings in respect of her minor son for a representative of the French court to compile an inventory of the settlor's estate (including in relation to assets of the trust). The Trustee sought to intervene in the French guardianship proceedings seeking essentially to limit or curtail the disclosure orders in so far as they impacted on the assets of the trust. I summarised the points of main importance in that case in coming to the conclusion that it would be appropriate to approve of the Trustee's intervention in the French proceedings" I am reported as having stated that:

"The European courts are concerned with matters relating to the guardianship of young Akram, including the matter of his entitlements to inheritance. In the resolution of those matters there, the concept of the trust as an entity apart from the free estate of the settlor and the importance of the protection of the trust interests are matters which may have been overlooked as the trust concept is foreign to civil law. The Trustees should have the opportunity to seek a resolution of this difficult legal conflict for all the reasons already mentioned and for the further important reason that many of the enterprises of the trust companies are established and operative in Europe". The directions which were given (to continue to resist the French disclosure orders) would have enabled the Trustees to *"urge the French court to take into account the fact that the trust was established under the laws of the Cayman Islands by the settlor with the intention that it should operate as an entity separate and distinct from his free estate. If so, the French court may*

well be persuaded that the proper law is the law of these Islands...."

26. Ultimately, because among other things, of the Trustees' intervention in the French proceedings, the dispute came to be settled by the Cayman Court by the approval of the widow's and her minor son's payment out from the trust.
27. Those cases ***In Re Lemos*** and ***In Re Ojeh*** demonstrate that the Cayman Courts will "circle the wagons" for the enforcement of the foreign element protection of Cayman law, in appropriate cases.
28. I emphasise however, that the protection will be lifted in appropriate cases to ensure that there is adequate and fair policing on the part of the judges to prevent abuse.

To disclose or not to disclose?

28. At front and centre of the tools available to the Courts for doing this is, the Confidential Relationships (Preservation) Law (1995 Revision). It is perhaps the most inappositely named and most widely misunderstood of Cayman's laws given its comprehensive provisions for protection of confidentiality, but also for the disclosure of confidential information in appropriate circumstances..
29. Disclosure of confidential information is often the issue involving onshore lawyers, courts and revenue authorities and in respect of which the tension becomes most acute.
30. In this regard, the judicial challenge has been to strike the balance between the legitimate objectives claimants and of the global initiatives against

serious crimes, while at the same time preserving and protecting the legitimate interests of beneficiaries of valid Cayman Islands trusts, as well as those of innocent third parties.

31. I will mention but two of the many decided cases, each of which I believe is illustrative of the approach.
32. ***In Re H [1996] CILR 237***, the question was whether the trustee of a Cayman Islands trust should disclose information about the assets held on trust in response to a subpoena issued by a grand jury in Pennsylvania in criminal bankruptcy proceedings against the settlor. The bankruptcy proceedings were premised on the presumption of invalidity of the Trust. I ruled that it would be contrary to public policy to allow disclosure by the trustee of information relating to trust assets in compliance with the subpoena, whilst the issue of the trust's validity was still subject to litigation in the Cayman Islands. As I remarked in relation to that case:

"The trustee... owes fiduciary obligations not to divulge trust information except in accordance with Cayman law which governs the trust..." "If validly constituted, the trust holds 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".

33. *In re Ansbacher (Cayman) Ltd*⁹, a Cayman bank was permitted to disclose to Irish Court appointed inspectors, confidential information for the purposes only of the liquidator's inquiry into allegations that the bank's affairs had been conducted with an intent to defraud the Inland Revenue in its capacity of creditor of the bank's clients for taxes owed. The Cayman bank wished to co-operate for the purpose of clearing its own name. I made a direction that the information was first to be redacted to delete references which might disclose the identities of clients who were not themselves involved in the allegations.

34. The following is extracted from the judgment:

"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 it is 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.... One principle has, however, always remained constant here, as it has in all countries which share our

⁹ [2001] CILR 214

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. Further, that the Cayman court will not direct the giving in evidence of confidential information without some assurance as to the limitations on its use or, for that matter, abuse.”

35. The case law reveals that the jurisprudential balance which has been achieved in the application of the Cayman Islands' confidentiality laws belies the myth of absolute secrecy at all costs. Confidentiality is maintained where necessary and appropriate, in the interests of the beneficiaries of trusts as a whole, and our courts have been robust in maintaining that position. However, it has also been the case that where necessary and appropriate in the interests of justice, weighing the legitimate interests of the beneficiaries in the balance, disclosure will be permitted in order to prevent the wrongful use of trusts, and on conditions designed to protect the interests of innocent third parties. Information-gathering is, however, only the first stage. The next question in this discussion naturally becomes this: to what extent are the courts prepared to "lift the veil" when they are in possession of the relevant information? Or, stated more appropriately – declare the trust to be a sham.

Piercing the veil?

36. In *Re Al Sabah* [2004-05] CILR 373¹⁰, the question was the effect of a foreign bankruptcy order in relation to assets which had been settled by the bankrupt Sheikh Al Sabah onto a Cayman Islands trust. He had been declared bankrupt by the Court of his domicile of choice in the Bahamas in the face of a judgment for fraud for US\$800 million declared against him by the English Court. The Privy Council in upholding the Cayman Court, held that section 122 of the Imperial Bankruptcy Act 1914 applied in the Cayman Islands, with the result that the courts of British territory are required to provide assistance to each other in matters of insolvency and bankruptcy. The Bahamian trustee could therefore become armed with the avoidance provisions of the Cayman statute which empowered him to seek to set aside the Cayman trusts.
37. The Privy Council emphasised that the court has discretion and approved the lower Courts' reasoning concerning the scope of that discretion. The court was entitled to have regard to the position of the victim of the fraud as the petitioning creditor. Consideration of the purposes of having the trusts governed by Cayman law, and of the location in Cayman of those having legal title and control of the assets, will also be important. The primary question was whether the connection between the settlements and the jurisdiction were enough to justify the application of the Cayman avoidance provision.¹¹
38. In that case, the Cayman court did not have to go on to deal with an alternative argument which had been advanced on behalf of the petitioning creditor; namely, that the "veil" of the trust should be lifted because it had

¹⁰ The Cayman court recognised the appointment of the fraudster's trustee in bankruptcy in the Bahamas and granted him the powers accorded to a trustee in bankruptcy in the Cayman Islands in respect of the Cayman trusts.

¹¹ Collins: A Fine Balance, Cayman Financial Review, June 2007

been used as sham as an instrument of fraud. In effect, the same results were achieved by the application of the bankruptcy avoidance provisions.

39. Following the decision of the Jersey Royal Court in *Abdel Rahman v Chase Bank*¹², there were concerns about the likelihood that many offshore trusts, which were administered following the wishes of settlors almost as a matter of routine, would be declared to be shams. But as close as we came in *Re Al Sabah*, in over 55 years of law reporting from the Cayman Islands, there has not yet been a single reported decision in which the court declared a Cayman Islands trust to be a sham. This may perhaps be unsurprising in a jurisdiction with a comprehensive system for licensing and regulating professional trustees who should be unlikely to accept the type of business which would result in a finding of that nature.
40. From the Jersey perspective (in *Re Esteem Settlement*)¹³, it could now be regarded that the test for sham has been settled as requiring a common intention on the part both of the settlor and the trustee that, notwithstanding the express terms of the trust, the assets would be treated as if they were the settlor's own, to do with as he liked. This is a very high threshold. While there has as yet been no need, or opportunity, to fix the test as a matter of Cayman law, the requirement that there should be that common intention, is in my view, compelling.
41. The increasing use of Protectors with extensive control over Trustees is a factor that contributes to onshore scepticism. Much of the onshore commentary I referred to earlier (including the Levin report) suggests that the role of Protector is merely a way of allowing the settlor to have his cake

¹² [1991] JLR 103

¹³ [2003] JLR 188

and eat it too; to nominate someone to control the Trustee on his behalf without appearing to do so himself. And thus, that the settlor should be considered the true beneficial owner of the assets purportedly settled on the terms of the trust. You will recall that the “Stop Tax Haven Abuse” Act would provide that all powers and interests held by trust protectors of foreign trusts should be attributed to the US grantor.

42. In the light of the facilitative reserved powers provisions which have been a feature of the Cayman Islands Trust Law since the 1990's, it is permissible as a matter of Cayman law for the Trustee to be subject to extensive control (in relation to the matters listed in the statute) by the settlor or by someone else. That person could be acting on behalf of the settlor or in a personal or fiduciary capacity. The powers exercisable as a result do not require to be circumscribed by fiduciary obligations. One of the emerging jurisprudential challenges is to identify the necessary limits – the extent to which such unregulated control can be permitted before what results cannot be said to be truly a trust - while preserving the utility of the structures.
43. In *HSBC International Trustee Limited v Wong Kit Wan et al*¹⁴, Henderson J of the Grand Court considered the status of a Protector of a Cayman Islands discretionary trust. As is now quite common, the Protector had extensive power to direct the Trustee in relation to the administration of the trust. Henderson J remarked that:

"The appointment of a protector is intended to provide an additional layer of control over the trust and enhanced security for its beneficiaries. It is a common feature of trusts originating

¹⁴ [citation needed]

in this jurisdiction". He also observed, "Because of the nature and extent of the authority often conferred upon a protector there is a trend in the authorities to attach fiduciary obligations to the exercise of his authority as well" although "It is open to the settlor, to provide that the powers of the Protector are exclusively and merely personal".

44. As that dictum suggests, the challenge of identifying the necessary limits has, and will continue to be met in large part as a result of thorough analysis of the fundamental principles of trusts law in the decided cases. The challenge again brings us full circle back to the "irreducible core" of obligations owed by the Trustee to the beneficiaries, and which has had to be developed to accommodate new developments in the use of trusts. In relation even to reserved or granted powers, where one can locate the core obligations of a Trustee in someone who effectively steps into the shoes of the Trustee, the core concept of the trust (the irreducible obligation to perform the trusts honestly and in good faith for the benefit of the beneficiaries) will I would venture to suggest, be left intact.

Conclusion

45. This analysis, therefore, has taken us to the heart of the trust concept, the central idea that gives it its legal magic – the flexibility that is desired, as well as the certainty that is necessary – and which underpins the approach of our courts in relation to the so called "tax haven" advantages adumbrated by the Privy Council in *Schmidt v Rosewood*, even while protecting and preserving the integrity of the trust concept. At the heart of the judicial approach – at least in the Cayman Islands – is the notion that the trust, in order to be valid, must be subject to the supervision of the court in the enforcement of the core obligations to perform it honestly and in good faith.
46. That being so, as I have endeavoured to show from some of the decided cases, one should be able to hope that there could yet be an enlightened approach to the onshore discussion on the subject of offshore trusts.
47. There is however, every good reason for offshore scepticism: the real impetus for the debate being no longer genuine concerns about abuse, but more about the control of the movement of money in our ever more globalised economy.
48. On this occasion, it has nonetheless been a pleasure and a privilege to present The Cayman point of view to such an obviously enlightened gathering.

Hon. Anthony Smellie
Chief Justice

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