

“Breaking Bread” – Can Offshore Asset Protection Trusts Withstand Attack on Traditional Principles?

**Prepared by N. Gregory McNally TEP, B.A., LL.B., M.B.A., JD, LL.M. (Int’l Tax)
for the Toronto Branch of the Society of Trust and Estate Practitioners
Passport Program, April 6, 2006**

Introduction

Peter Willoughby, in his monograph Misplaced Trust¹, was critical about what he referred to as “user friendly” trust legislation in offshore jurisdictions, which supports service providers in marketing trusts as “products”, rather than assisting true fiduciary relationships between a trustee and a beneficiary. He correctly foresaw that disenfranchised relatives and general creditors would attempt to attack offshore asset protection trusts (“APT’s”) for not meeting the essential criteria (developed over centuries of adjudication), which creates a traditional trust relationship.

This paper reviews a handful of well known cases adjudicated in certain offshore jurisdictions and attempts to apply the findings in those cases to recently designed APT legislation in offshore jurisdictions favoured by Canadian planners. The idea is to try to get a sense of whether or not the courts in these favoured jurisdictions will uphold their “user friendly” provisions in the face of traditional maxims.

This paper will not incorporate decisions made in cases adjudicated in the United States, although many STEP members will be familiar with them. American courts are known to follow a “substance over form” approach as compared to their Commonwealth counterparts, and it is not likely that the US judgements would be more persuasive than what is readily available.

Essential Components of a Trust – Where is an APT vulnerable?

In order to create a trust, you require three certainties. It makes sense that if you are trying to invalidate an APT, you would start by attempting to attack the fundamental principles that establish a trust. The three certainties are as follows:

- 1) The ***Certainty of Intention***: meaning that the Settlor truly intended to gift assets to a Trustee (either him/herself or a third party) for the benefit of another party (the “Beneficiary”). And for the purposes of this paper I will refer to the Settlor as the individual who, or entity that, actually contributed the assets to the trust, as opposed to a professional service provider who technically formulates the trust on behalf of the true contributor.

The prima facie test for this certainty is usually met with the existence of a written trust indenture, which will be taken for granted for the purposes of this paper. But it is in the day-to-day administration and the control that the Settlor exercises over the trust that may provide an argument against intention.

- 2) The *Certainty of Object*: meaning that the Beneficiaries must be identifiable.

Much of the new offshore legislation is geared toward supporting non-charitable purposes as legitimate objects, which has always been contentious in traditional trust cases. This area of offshore legislation may be driven more for tax objectives than anything else. However, while I recognize that a Settlor may attempt to use a purpose trust for further argument of lack of entitlement to trust assets, the cases dealt with in this paper do not hide the fact that the Settlor was himself a designated beneficiary.

With respect to most APT's, most Settlers do not want to totally disavow themselves of potential future entitlement and, therefore, do provide for their appointment, or potential appointment as a Beneficiary, in some form or fashion.

Also, Certainty of Object is usually not a line of attack in relation to asset protection cases, as the plaintiff wishes to in fact prove that the Settlor was/is beneficially interested in the assets.

- 3) The *Certainty of Subject*: meaning that there is a clear indication of what the trust assets are and that Trustee has rightful title to those same assets.

Many of the old trust cases centred on the actual identity of certain assets that were meant to form the trust corpus or whether in fact the Settlor had perfected title to assets in the Trustee.

In relation to attacks on APT's, the argument seems to formulate around whether in fact the Settlor's title to the assets was genuine in the first instance. In cases of fraud or theft the issue may be more easily determined, but the more difficult case rests on issues of contingent obligations or obligations created by legislation from other jurisdictions (matrimonial, forced heirship or tax), such legislation being in conflict with the public policy of, or at least not enacted in, the offshore jurisdiction.

This paper will focus on attacks against APT's under Certainty of Intention and Certainty of Subject, and review legislation that addresses these issues.

The Cases

In performing research for this paper, I was actually surprised at the number of cases that have been adjudicated in offshore jurisdictions regarding trusts. There have been a number of cases heard in the Royal Court of Jersey with a respectable handful of additional cases in the Supreme Court of the Bahamas, The Grand Court in the Cayman Islands and in the High Court of the Cook Islands. There are also a number of cases on record in England that would be relevant regarding offshore trusts, and these cases would be authoritative in the offshore jurisdictions given their Commonwealth or dependent status.²

The cases I found cover all manner of topics, from validity, to trustee liability. However, the five cases I have reviewed below were picked on the basis of their popularity amongst professional trustees and advisors and given their specific relevance to APT's.

Abdel Rahman v. Chase Bank (C.I.) Trust Company Limited, [1991] JLR 103

In 1977, Kamel Abdel Rahman ("KAR") settled a trust in Jersey with Chase Bank ("Chase" or the "Trustee"). The terms of the trust stipulated that the Trustee held the capital and income of the trust for the benefit of KAR (having regard exclusively to KAR's interests) and any beneficiaries appointed by KAR with the consent of Chase.

This general entitlement was subject to a further specific provision that allowed KAR to appoint a beneficiary for up to one third of the capital of the trust without Chase's consent in any 12-month period. Upon KAR's death, the trust assets were then to be divided up between KAR's second wife, KAR's mother, KAR's children from his first marriage and KAR's grandchildren.

There was overwhelming evidence that KAR maintained *defacto* control of the trust assets through ongoing management and in direct payment of trust assets to himself and third parties without the consent or even the knowledge of the Trustee.

The trust was being challenged by KAR's second wife, and defended by the Trustee, the representative of his mother's estate, the children from his first marriage and KAR's grandchildren. A more or less familiar fact pattern.

KAR's widow argued that a gift to a trust where the donor is the primary beneficiary is simply an incomplete gift and offends the Jersey Customary Law maxim of *donner et retenir ne vaut* – (to give and retain is not possible).

Her second argument was that the trust was in fact a will, in that KAR never intended to make any substantive appointments during his lifetime, thus the assets devolved upon death (which would leave her more of the assets). As such, the court should not give credence to the trust indenture as it was not what it purported to be. The trust was in fact a will and therefore the relationship was a sham.

The Court found that the trust did breach the maxim of *donner et retenir ne vaut*, in both the construction of the settlement and in KAR's actions. Further, the Court held that, "The settlement in this case was a sham in the sense that it was made to appear to be what it was not. The court is satisfied that Kamel Abdel Rahman intended (a) to retain control of the capital and income of the trust fund throughout his lifetime; and (b) to use the trust in order to make testamentary dispositions and defeat, if he chose, the rights of the widow and heirs."³

I am not sure why the plaintiff and the Court did not simply argue the lack of intention to create a trust in the traditional common law sense, but this is certainly the heart of the

decision. There is no doubt that, on the basis that KAR dealt with the trust assets without regard to the provisions of the trust indenture (specifically in the lack of recognition of the appointed trustee and the qualified beneficiaries), there was no intent on his part to create a trust. The trust should have failed for not meeting the common law principle of Certainty of Intention, without getting into a Jersey Customary Law maxim or sham.

However, *Rahman* is usually synonymous in the trust industry with the definition of “sham” and this is no longer valid, if it ever was. Ominously, the Court specifically states that, “This was not a conspiracy but there was a wish to satisfy the requirements of the settlor at all times.”⁴

The Court’s interpretation of “sham” in *Rahman* will be distinguished in a subsequent Jersey case noted below called *In Re Esteem Settlement*. In that case, to prove “sham” the plaintiff will have to show intent on the part of the Trustee, as well as the Settlor, to deceive third parties. Given that posture, “sham” would not have met the threshold in *Rahman*.

***In Re Esteem Settlement* [2003] JLR 188**

In Re Esteem Settlement is just one case in a number of cases adjudicated around the world concerning Sheikh Fahad Mohammed Al Sabah and Grupo Torras S.A. (“GT”). The Sheikh was a member of the Royal Family of Kuwait and employed by the Kuwait Investment Office (“KIO”) an agency of the Kuwait government, from 1964 until his retirement in 1992. During the years surrounding the case at hand he was Chairman of KIO.

GT was simply a Spanish company incorporated by the KIO to assist it with the KIO’s investment activities.

From 1988 until 1992, the Sheikh, together with twenty-one other people, defrauded the KIO of \$430 million dollars, primarily by diverting funds from GT and affiliated KIO corporations to their own bank accounts. The Sheikh, for his part, diverted funds first to himself and then on to a number of trusts and anstalts that he had established in several different jurisdictions, such as Jersey, Liechtenstein, Cayman and the Bahamas.

By 1992, the frauds were discovered and proceedings were commenced against the Sheikh in England and the Bahamas, where he had subsequently taken up residency. Judgement was obtained against the Sheikh in England for US\$800m and he was petitioned into bankruptcy. Since the Sheikh no longer had any personal assets with which to satisfy the claims against him, the plaintiffs went after all of the trusts and anstalts set up by the Sheikh around the world.

The present case (heard 11 years after the commencement of initial proceedings against the Sheikh in England and the Bahamas) concerns the Esteem Settlement, which was a trust established in 1981 in Jersey by the Sheikh for the primary benefit of himself, his wife Barbara and his son Misha. The trustee was Abacus (CI) Ltd, the professional trustee division of Coopers & Lybrand, Jersey. The Sheikh settled the trust with various gifts of

his own personal funds from 1981 to 1986. These gifts totalled just under US\$5m. These assets were used to purchase farms in England and to hold title to the family residence, which was located in England at the time. The Esteem Settlement was established by the Sheikh in order to avoid Kuwait laws on forced inheritance and to avoid UK taxation.

However, in 1992 the Sheikh transferred into the Esteem Settlement approximately US\$7.8m of the funds that he had stolen from GT. The Jersey Court later set these transfers aside in separate proceedings, but the present case concerns the efforts by GT and the Trustee in Bankruptcy for the Sheikh to attack the original sums settled into the trust before the perpetration of the frauds. These funds are referred to in the case as the “clean funds.”

The lawyers on behalf of GT attacked the trust based on three arguments that generally surrounded Certainty of Intention and two arguments that can generally be described as pure public policy arguments.

With respect to Certainty of Intention they claimed that the trust should be held invalid from its inception because: 1) it was a sham, based on the principles enunciated in *Rahman* above, or alternatively, 2) that the settlement into the trust offended the maxim of *donner et retenir ne vaut*, again as per *Rahman*, or alternatively, 3) after the valid settlement of the trust, the trust could be subsequently held invalid by “lifting the trust veil” or “piercing the trust veil” similar to the concept of piercing a corporate veil. The reader herein should take note that the first two arguments take the position that the trust never got created from the start, whereas the third argument admits that the trust was valid at the start, but then subsequently became invalid.

With respect to the public policy arguments, the plaintiffs claimed that the trust was established for purposes against Jersey public policy and therefore, could be invalidated under article 10(2)(b)(ii) of the Trusts (Jersey) Law 1984 (now article 11(2)(b)(ii)). Second, if none of the preceding arguments worked, the plaintiffs argued that the Court should, via common law equity, create a rule in Jersey for the use of remedial constructive trusts based on the same criteria enunciated in other common law jurisdictions and subject the Esteem Settlement to such a remedial constructive trust, based on a combination of the Sheikh’s alleged control over the assets and his misuse of the Esteem Settlement in defrauding KIO.

The court looked first at the argument of sham by the plaintiff. It quoted the decision of Diplock, L.J. in *Snook v. London & W. Riding Invs. Ltd.*,

“I apprehend that, if it [the word “sham”] has any meaning in law, it means acts done or documents executed by the parties to the ‘sham’ which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. One thing I think, however, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. MacLure* and *Stoneleigh Finance, Ltd. v. Phillips*), that for acts or documents to be a ‘sham,’ with

whatever legal consequences follow from this, **all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.**”

⁵ (emphasis added)

In the present case, there was no evidence put forward by the plaintiff that Abacus (the trustee) intended to deceive anyone with respect to its role as trustee, nor was it a party to the frauds perpetrated by the Sheikh and his associates. While Abacus did generally act on the wishes of the Sheikh with respect to the dealings with the trust assets, no intention to deceive was evident. As such, the Court distinguished *Rahman* and stated clearly that ***there must be an intention on the part of both the Settlor and the Trustee to deceive third parties in order to create a sham in regards to a trust.*** The plaintiffs failed on the first argument.

With respect to the second argument, although *donner et retenir ne vaut* is part of Jersey Customary Law, and the Trusts (Jersey) Law 1984 now specifically precludes the application of the maxim to trusts under article 9(1), it is still worthwhile describing the Court’s deliberation on the concept as it may apply to Certainty of Intention.

The Court stated that *donner et retenir ne vaut* did not apply in this case, as it did in *Rahman* because the Sheikh did in fact gift the original sums to Abacus and Abacus perfected control and dominion over the settlement. Again the Court here distinguished *Rahman* in that it stated that,

“The maxim of *donner et retenir ne vaut* required that the settlor retain a free and unfettered power to dispose of the assets put into the trust at the time of the gift. The gift could not become invalid under the maxim if the settlor later assumed that power, as it was concerned with the retention of power by the donor at the moment of donation. If the donor divested himself completely of the thing given, the gift would be valid. If the donee later gave the relevant power back to the donor, this would be a new voluntary act on his part, though if this happened very soon afterwards the court might regard this as evidence that the donor did in fact reserve to himself the power of disposal at all times. Extending the maxim to situations in which the settlor had later assumed the power would lead to uncertainty, as the validity of the settlement would depend upon timing.”⁶

The Court’s deliberation concerning the perfection of a gift with respect to *donner et retenir ne vaut* shares a similar logic with the principles surrounding Certainty of Intention and is worth noting. If the Settlor perfected the gift to the Trustee, the trust is valid from that standpoint, regardless of future actions on the part of the Settlor, unless the actions took place so soon after the gift as to nullify Certainty of Intention from the start.

Instead of invalidating the creation of a trust on grounds that the Settlor exerted overt control, courts should be persuaded to look to remedies based on breach of trust on behalf of the Trustee as they affect the Beneficiaries, not creditors of the Settlor.

Regarding the plaintiffs' third argument, piercing the trust veil, the Court rightly reasoned that the principle did not apply to trusts as it did to corporations. The concept of piercing the corporate veil concerns the elimination of the corporate entity where the shareholder maintains effective control of the corporate assets. With a trust, the beneficial interest in the assets is not vested in the same entity that is alleged to be wrongfully controlling them. Overt control by the Settlor, over an otherwise valid trust, does not penetrate the trust it simply creates a breach of trust duties on behalf of the Trustee, the proper remedy for which is to sue the Trustee for breach of trust, not to transfer the Beneficiary's assets to the Settlor. The corporate concept of piercing the veil, does not fit a trust relationship. The plaintiffs, therefore, failed on their third argument.

Regarding the plaintiffs' fourth argument, the Court found no grounds in the claim that the Esteem Settlement was contrary to public policy in Jersey. The trust was originally established to plan around tax and forced heirship rules in other countries. The Court found this as perfectly legitimate reasons to establish a trust. The fact that the Sheikh later placed stolen funds into the trust did not render the trust itself void as against public policy. The transfers of stolen funds were simply treated as void. The plaintiffs' fourth argument, therefore, failed.

Regarding the plaintiffs' last argument, the Court felt that remedial constructive trusts were a serious encroachment on the proprietary rights of individuals and that Jersey already had ample remedial laws to deal with disputes concerning trusts. They also stated that the public policy arguments actually favoured upholding legislation protecting the trust form over individual equity, as trusts played an important role in Jersey's financial and commercial life.

This final statement by the Jersey Court is a strong rebuttal to those advisors and commentators who think that offshore courts won't uphold designer legislation. The decision in *In Re Esteem Settlement* also significantly narrowed the application of *Rahman*, in that it made it clear that in order to have a sham in respect of a trust, the Trustee must be acting dishonestly in concert with the Settlor to deceive the outside world and that a gift into a trust is not invalid based on the Settlor's subsequent actions. Lastly, this case was also enlightening with respect to the application of the corporate concept of piercing the veil, which the Court decided could not apply to a trust relationship.

***Grupo Torras S.A. v Sheikh Fahad Mohammed Al Sabah, et al* 1994 No.72/1 OFLR 443⁷**

The Bahamian cases involving *Grupo Torras and Fahad* are also regularly referred to by commentators in a similar fashion to their Jersey counterparts, and to that extent, I take one of them up here. However, it should be noted that these judgements (Supreme Court and Court of Appeal) are of restricted value since they dealt with an application to remove a Mareva injunction placed on the trust assets of two trusts established by the Sheikh. This application was interlocutory in nature, therefore, the Court did not adjudicate the issues of the case in full. The Court of first instance was only concerned with whether or not the plaintiffs made a *prima facie* case concerning their claims to recover the assets.

The above reported case actually comprises both judgements. The first judgement was rendered by Sawyer, J. in the Bahamas Supreme Court and the second, was rendered by Gonsalves-Sabola, J.A. in the Bahamian Court of Appeal, on an appeal of Sawyer, J.'s ruling.

The two rulings centre on an application by the corporate trustee defendants to have an earlier granted Mareva injunction revoked on the basis that the lawyers on behalf of the plaintiffs did not disclose certain material facts and rulings at law, which would have presumably had the effect of nullifying the original legitimate grounds for the grant.

Mareva injunctions are generally *ex-parte* applications where only counsel for the plaintiff attends. Therefore, there is a duty on plaintiff's counsel to objectively present both sides of the case to the presiding judge. If they don't, counsel for the defendants can later return to court to have the injunction removed.

The primary oversights claimed by the defendants to the Court were that:

- 1) The statement of claim did not properly establish a cause of action since the plaintiffs argued that the trust assets were the Sheikh's and not the trustees'; and that
- 2) Plaintiffs' counsel did not make the Court aware of the limitation period existing in the *Fraudulent Dispositions Act, 1991* (No. 1 of 1991) (the "Act"), to which their claim would be subject.

The facts of the case as they pertain to the fraudulent deeds are the same as noted above in *In Re Esteem Settlement*. However, in this particular case, the Sheikh established two trusts in the Bahamas, one called the Roger Trust and a second called the Bluebird Trust.

A specific date was not given for the establishment of the Roger Trust, but it was alleged to have been established between 1988 and 1992. This trust was later renamed the Comfort Trust and the situs of its jurisdiction was transferred to Cayman. The Sheikh was named as the primary beneficiary and protector of the Comfort trust, with his son, Misha, and Misha's decedents, named as additional eligible discretionary beneficiaries.

The Sheikh transferred to the trust two residences in Lyford Cay. The Sheikh used one residence for himself personally and the Sheikh's family members and guests used the second residence. However, what is key here is that there was no evidence put forward by the plaintiffs (as was noted by the Court) that the Sheikh used stolen money for the original purchases, nor was there any evidence that the Sheikh placed stolen funds directly into the trust.

The Bluebird Trust was established in 1992, with the same general provisions noted above, however, the Bluebird Trust was settled with approximately US\$3m worth of stolen proceeds held by the Sheikh in a London bank account.

Evidence, supporting their claim of sham and constructive trust was put forward by plaintiff's counsel, that the Bluebird Trust lent funds to an organization called the Gary

Player Foundation, which was established to organize golf outings around the world for its members. It appeared to the Court that this loan could have been converted into a membership of some sort for the benefit of the Sheikh, although this was not readily explained in the judgement.

Also, the Court heard evidence that a lawyer resident in Spain, who acted as counsel to the Sheikh in relation to some of the Sheikh's personal matters, had instructed the Trustee of the Bluebird Trust to purchase bonds issued by a publicly traded Spanish company, which instruction the Trustee acted upon.

Given this evidence the Court ruled that there was a *prima facie* case made out by the plaintiffs that the trust was a sham, although the Court did not, unfortunately, explain the legal nature of sham.

In ruling that a *prima facie* case for sham existed, the Court seemed not to concern itself with Diplock, J.'s ruling in *In Re Snook* above requiring complicity of a second party to deceit in order for sham to exist. To the contrary, Sawyer, J. specifically exculpated the Trustee from any participation in the fraudulent actions of the Sheikh.

The lower Court also claimed that there was a case that could be made out for a constructive trust, which it then mixed up with the concept of "piercing the trust's veil". Unfortunately, the Court seemed to confuse the primary issue of what does or does not constitute a valid trust with the issue of what remedies are available to a plaintiff against a third party in possession of stolen funds, which the following quote evidences:

"No one for the plaintiffs have said that the Bluebird Trust is not a trust in the normal sense of that word; what is being sought, I think, is a lifting of the veil of that trust (which is one among others in various jurisdictions) so that the court can determine, if, and to what extent, the corpus of the trust, is traceable to part of the funds allegedly misappropriated from GT and if so, to what extent that corpus is to be considered as Sheikh Fahad's property and therefore subject to a tracing order."⁸

The Court of Appeal was of no further help:

"If it be established that the Bluebird Trust was a vehicle over which Sheikh Fahad exercised substantial or effective control, the Court would pierce the corporate structure of PTC [the Trustee] and regard Sheikh Fahad as beneficial owner of the assets of the trust.... The Court is not hobbled by the complexity of the legal structures into which a defendant has caused his funds to disappear so that only he or his agents could disentangle his personal interest, thus achieving a confusion against the contingency of a future judgement. For the purposes of considering the grant of a Mareva injunction I can see no sensible distinction between the Sheikh's [sic] having in fact exercised such control and the availability of machinery in the trust itself whereby the results of such control could be achieved at the will of Sheikh Fahad."⁹

Yet in just the very preceding paragraph the Court of Appeal states, “Undoubtedly, to the extent that assets of the Bluebird Trust can be regarded as being the Sheikh’s money, those assets are effectively rendered judgement proof whether in the hands of the trustees or in flight to an alien jurisdiction [Cayman] under the terms of the trust.”¹⁰

In the preceding paragraph Gonsalves-Sabola, J.A., seems to state that the trust would be declared invalid if it was proved that the Sheikh rendered control over it, which seemed to be where he would side given his acceptance of Sawyer, J.’s version of the facts and his own reading of the provisions of the trust (which provided for the Sheikh’s directions in terms of eligible investments). However, in the second paragraph Gonsalves-Sabola, J.A., seems to say that the trust would be valid, if it can be proved that the trust was settled with the Sheikh’s own funds. He leaves it unclear how these two principles inter-relate in law, if at all.

In relation to plaintiffs’ counsel overlooking the statute of limitations defence available to the defendant via the application of the *Fraudulent Dispositions Act* to the settlement of the trust, the Supreme Court ruled that plaintiffs’ counsel did not erroneously omit the potential application of the limitation period, on the technical grounds that such defences need to be specifically pleaded by the defendants and are not automatically applicable in the first instance.

However, Sawyer, J. went on to state that he thought that the limitation defence would also not be accessible on the grounds that the *Act* specifically states at s.7 that it cannot be used to validate an otherwise illegal disposition. He should have stopped there.

Unfortunately, he found fit to add a third reason, which seems ungrounded at best. He stated that the *Act* did not apply to the specific settlement of the trusts at hand, as the settlement of trusts in and of itself, as an action, is not fraudulent and should be kept separate from the Sheikh’s other actions in initially defrauding GT.¹¹ If the Fraudulent Dispositions Act does not apply to the knowing settlement of stolen funds into a trust, I’m not sure to what, if anything, it possibly could?

I can only believe that the Court’s comments were driven by its good intentions not to see the defendants utilize the limitation period in the *Act* to its illegitimate benefit. However, it didn’t need to go that far given that it already got the result that it wanted under the first two grounds.

On the positive side, the Court also exclaimed that while it could not have been the intention of the Bahamian Parliament to allow individuals to use its legislation as a cover for fraudulent activity, Parliament did intend to create “asset protection trust” legislation for legitimate purposes concerning, “...the minimisation of taxes or the protection of honestly acquired assets from the sometimes unreasonable demands placed on those assets e.g., as a result of an award of damages against a professional person....”

What can we take away from these cases if anything? I think that it can be fairly said that the Bahamian Court will look for methods to invalidate a trust containing stolen proceeds,

although its potential reasoning, be it sham, constructive trust or piercing the veil, is not yet properly elucidated.

Conversely, I also think that the Court will uphold a Bahamian trust settled with bona fide assets, subject to the provisions of the *Fraudulent Dispositions Act*. I think that the Court would not have a problem upholding the limitation provision in respect of claims emanating from general creditors or even foreign tax authorities (if they were ever to get one).

Further, I doubt that the Bahamian Court would invalidate a trust for lack of intention (sometimes erroneously referred to as *de facto* control), where the activities of the Settlor do not go beyond those legislated by the Bahamian Parliament under the reserve powers sections of its trust legislation, which are fairly broad. They may not in any event, given a particular fact pattern, but they would almost certainly not if the actions were within the Bahamian legislation.

515 South Orange Grove Owners Association v Orange Grove Partners [1995] CKHC 9; 208.1994 (6th November, 1995)¹²

The *Orange Grove* case is again, a case that gets referred to in a number of papers and commentaries around the world. Unfortunately, however, I think that the judge's comments have been "institutionalized" in a manner that cannot be supported by the judgement itself. Part of the reason for this, I believe, stems from the fact that these international judgements are difficult to find in written form and perhaps many authors perpetuate the comments of previous authors before them, without actually reading the text of the judgment in its full and original form.

Also there is an element of tortured reasoning by McMullin, J. that was created due to the fact that the defendants clearly defrauded the plaintiffs, and "bad clients make bad law." McMullin, J.'s acrobats were later dealt with by an amendment to the Cook Islands *International Trusts Act (1984)* (the "*Act*"), but the case is still worth reviewing here for its relevance to potential judgements by other courts in other offshore jurisdictions.

The defendants in this case were contractors who built a set of condominiums that were purchased by the plaintiffs in 1988-89. The condominiums were not well built and suffered from numerous defects. The plaintiffs wrote a letter to the defendants notifying them of the defects in 1991. Suit was brought by the plaintiffs against the defendants in 1992, when they failed to fix the defects. In April 1994, the plaintiffs received judgement against the defendants for approximately \$5.7m.

Just prior to the judgement being set down, the defendants, in December of 1993 established a trust with Southpac Trust International in the Cook Islands, which they settled with the shares of a Nevada limited life company (which presumably had some assets in it) and then added US\$900,000 in funds directly to the trust in a transfer dated January 27, 1994.

The plaintiffs were originally granted an interim Mareva injunction in an *ex-parte* application on December 11, 1994, freezing the assets in the trust. This injunction was subsequently discharged on December 20, 1994 by the same judge (Dillon J.), upon a full hearing of the issues from both sides.

Dillon, J., had found that a claim against the dispositions into the trust was statute barred by ss.13B(8) of the *Act* because the action in the Cook Islands was brought more than two years after the sale of the condominiums to the plaintiffs.

Section 13B of the *Act*, as it then was, read in part as follows:

“(1) Where it is proven beyond reasonable doubt by a creditor that an international trust settled or established or property disposed to an international trust

- (a) as so settled established or disposed by or on behalf of the settlor with principal intent to defraud that creditor of the settlor; and
- (b) did at the time such settlement establishment or disposition took place render the settlor, insolvent or without property by which that creditor’s claim (if successful) could have been satisfied,

then such settlement, establishment or disposition shall not be void or voidable and the international trust shall be liable to satisfy the creditor’s claim out of the property which but for the settlement establishment or disposition would have been available to satisfy the creditor’s claim and such liability shall only be to the extent of the interest that the settlor had in the property prior to settlement establishment or disposition and any accumulation to the property (if any) subsequent thereto.

(8) For the purposes of this section,

- (a) the date of the cause of action accruing shall be, the date of that act or omission which shall be relied upon to either partly or wholly establish the cause of action, and if there is more than one act or the omission shall be a continuing one, the date of the first act or the date that the omission shall have first occurred, as the case may be, shall be the date that the cause of action shall have accrued.
- (b) in the case of an action upon a judgment, the date of the cause of action accruing shall be, the date of that act or omission or where there is more than one act or the omission shall be a continuing one, the date of the first act or the date that the omission shall have first occurred, as the case may be, which gave rise to the judgment itself.

(10) In this section the term “creditor” includes any person who alleges a cause of action.

The plaintiffs then attempted to get the injunction re-instated on the basis that the trust was invalid due to the fraud and that Southpac was a constructive trustee on behalf of the

plaintiffs. But, this argument went nowhere and in his decision dated March 11, 1994, Dillon J. stated:

“Here we have a registered international trust company operating in the Cook Islands and subject to and governed by Cook Island law. The transactions referred to in Mr. Goldman’s affidavit [the dispositions to the trust] are the usual and normal business activities of the Sixth Defendant [Southpac] and indeed of all international trust companies. It cannot be implied that such transactions by themselves create a constructive trust of that the Sixth Defendant is a constructive trustee...

Both Counsel have produced authorities. These would indicate that the approach by the American courts to constructive trusts is more liberal than the approach at present current in Commonwealth jurisdictions.”¹³

The only issue on appeal was the December 20, 1994 decision of Dillon, J.’s, regarding the application of the limitation period against the plaintiffs’ claim. Apparently, the plaintiffs gave up the argument of constructive trust, as McMullin, J. in the appeal decision, noted as follows, “*They [the plaintiffs] do not seek to annul any international trust or any disposition of property to such a trust.... That trust, however, remains on foot notwithstanding the appellant’s proceedings.*”¹⁴

The sole issue at appeal was whether or not the date referred to as the “cause of action” in ss.13B(8)(b) was the judgement date rendered by the court in California that heard the underlying claim or whether it referred to the date when the acts or omissions of the defendant occurred in building and selling the condominiums to the plaintiffs.

I think that a plain reading of ss.(8)(a) and (b) evidence that “cause of action” in both subsections refer to the acts and omissions of the defendant. The reason that both sections were included were to guard against the very judgement that McMullin, J. made, which was to take a judgement date in a different jurisdiction as the “cause of action” date.

Defendants’ counsel argued that if the “cause of action” date meant the date from which any judgement was rendered in any jurisdiction, there would be no certainty for the trustees that the trust assets were safe from contingent claims. Further, Parliament for the Cook Islands would not have intended such an outcome.

However, McMullin, J. accepted instead the argument of the plaintiffs’ counsel, that you could not have a “creditor” in the legal sense of the word, for the purposes of ss.(8)(b), since creditors are not creditors before a judgement, they are merely claimants. Therefore, Parliament must have really intended that “cause of action” started from the date of a judgment in the Cook Islands or elsewhere. He made this finding the face of ss13B(10), which states that a “creditor” includes anyone making a claim.

He also had to jump through some hoops to continue his line of reasoning with the additional reference to “omission” and “continuing omissions”, as the case may be, in ss.

(8)(b), since it would seem impossible to have an “omission” at all in the case of a judgement, let alone “continuing omissions”.

McMullin, J. worked his way around that problem as follows:

“Some difficulty is occasioned by the use of the words in paragraph (b) "or where there is more than one act or the omission shall be a continuing one, the date of the first act or the date that the omission shall have first occurred, as the case may be." This could in the example given above be the continued failure to enter an appearance. However, we think that these words add nothing to paragraph (b) and, to adopt the words of Lord Bridge of Harwich in *McGonagle v Westminster City Council* [1990] 2 A.C. 716 at 727, they-

"should be treated as surplusage and as having been introduced by incompetent draughtsmanship..."¹⁵

It is clear that McMullin, J. simply ignored what the *Act* said and as such, he found that the plaintiffs’ actions came within the two year limitation bar, as the California judgement was less than two years before the dispositions into the trust. What is significant though, is that he in fact recognized the validity of the trust at all, as did the Court of first instance, despite its being settled by the Settlers with full knowledge of their insolvency.

Many commentators quoting this case make reference to McMullin, J.’s disparaging remarks about asset protection trusts and the poor draughting of the Cook Islands Parliament. However, in reading the case, I found that such an interpretation would be to misconstrue his real message.

The Judge’s comments about the draughting were substantively limited to what he felt were two instances of mis-numbering of sub-subsections contained in the *Act* coupled with some defensive posturing regarding the stand that he took with respect to ss.13B(8)(b) above. These comments were more self-serving than anything else, and I am sure that they would be distinguished in respect of a different case.

With respect to his comments about the Cook Islands *International Trust Act [1984]* and the Cook Islands jurisdiction as a whole, he was making reference to the arguments of plaintiffs’ counsel that the Cook Islands Parliament had specifically enacted legislation that favoured debtors over creditors to the extent that they would willingly protect them in fraudulent conveyances and that they did so, specifically to assist their economy and gain an advantage over other tax havens. His response to which was as follows:

“We think that the better view is that Parliament, in attempting to balance the interest of settlors, trustees and creditors, has prescribed certain specific limitation periods; that the right to sue on either a cause of action or a judgment is abridged but not eliminated, and that a common sense interpretation should allow for intention to be given to those two concepts. It should not be lightly assumed that Parliament intended to defeat the claims

of creditors by allowing international trusts to be used to perpetrate a fraud against a creditor.”¹⁶

These comments can hardly be interpreted as derogatory towards the Cook Islands. And given the background to his comments on the poor draughting of the *Act*, one can see how interpretations to the contrary are completely unfounded.

The Anderson Case

The Anderson Case, is an informal reference to two sets of proceedings; one in the United States and one in the Cook Islands. The relevant American judgement can be found as *Federal Trade Commission v. Affordable Media LLC.*, 179 F.3d 1228 (9th Cir.1999). The Cook Islands case is unreported, but is referred to as *United States of America, on behalf of its agency the Federal Trade Commission and A Limited*. Plaintiff No. 57/1999 High Court of the Cook Islands (Civil Division).¹⁷ For the purposes of this paper, I will only be referring to the Cook Islands judgement.

Michael and Denyse Anderson were from San Diego California. In May of 1997, they started a company called Affordable Media, which employed telemarketers to sell “media units” to people. These so called media units provided purchasers, or investors, with an opportunity to receive a share of profits to be generated by the sale of various products sold through television infomercials. However, within a year investors started to make complaints to the US Federal Trade Commission (“FTC”), as there seemed to be no underlying connection to the sale of goods, or it was unclear if perhaps the business portion of the scheme ever came to fruition.

In any event, the FTC investigators felt that Affordable Media telemarketers were using false, fraudulent and misleading statements in the course of their telemarketing operations and on April 23, 1998 the FTC commenced an action in the US District Court in Nevada to obtain an injunction to stop Affordable Media and to seek restitution to the existing investors.

Evidence showed that Affordable Media telemarketers had sold over US\$20m worth of media units and that the Andersons received a little over US\$9m of the sales proceeds.

Realizing the ultimate outcome of the FTC actions, the Andersons established a Cook Islands trust with themselves as co-trustees together with, Asiatic Trust, a local trust company. The trust indenture also appointed the Andersons as protectors to the trust with the power of consent over a number of trustee discretions. They settled the trust with US\$2,250,000.

As a result of the proceedings in the United States, the Andersons were removed as trustees of the trust under the terms of the trust indenture. Despite jailing the Andersons for contempt of court, the remaining Cook Islands trustee (Asiatic) would not pay over to the FTC any of the trust assets. The FTC therefore brought an action in the Cook Islands, presumably under reciprocal enforcement procedures (all this was not detailed) to enforce the 9th Circuit’s judgement against Affordable Media and the Andersons.

The Trustee, as defendant, brought a preliminary application to strike the FTC's statement of claim for not disclosing any reasonable grounds of action. Greig, CJ of the High Court of the Cook Islands, heard the application and quoting *Dicey & Morris on Conflicts of Laws*, edition 1993, Rule 3 p.97 and Lord Denning MR, in *Attorney General of New Zealand v Ortiz*, (1982) 3 All ER 432, he ruled that Cook Islands Courts have no jurisdiction to entertain an action founded on the act of another state.

Greig, CJ also noted that the defendants argued that the provisions of 13D of the *Act* would also apply to preclude the FTC action in the Cook Islands with respect to the trust, but he found that he need not rule on the application of that provision since the action was precluded on the basis of the general rule noted above.

The Anderson case gets more widely quoted for the fact that the 9th Circuit Court ordered the Andersons jailed for contempt of court and that APT's don't work for that reason. However, from the perspective of the application of a foreign state's laws in an offshore jurisdiction, I think that the Anderson case is an excellent precedent for the enforcement of APT's. It is clear that English case law and authorities do not support the enforcement of judgements on actions brought by a foreign nation (excluding specific treaty provisions). This authority is not limited to penal provisions, it also includes regulatory provisions and revenue laws.¹⁸

It is also noteworthy that the FTC settled with the Andersons for payment of US\$1.2m in 2001.¹⁹

Popular Offshore Jurisdictions for Canadians - Legislation Review

The following section summarizes the APT legislation of some of Canada's more favoured jurisdictions: the Bahamas, Cayman, Barbados and Jersey.

The Bahamas

A number of different Acts govern the establishment and validity of a trust in the Bahamas, the main ones being; the *Trustee Act, 1998*, the *Trusts (Choice of Governing Law) Act, 1989*, and its 1996 amending Act, the *Perpetuities Act, 1995*, and its 2004 amending Act, the *Fraudulent Dispositions Act, 1991* and the *Purpose Trust Act, 2004*.

The *Trustee Act, 1998*, lists certain powers that can be retained by the Settlor and provides for the role of a Protector. It also sanctions a "restriction against forceable alienation" under s.40, which may be provided in a trust indenture to keep any receiver in bankruptcy from claiming distributions to a bankrupt beneficiary. Information regarding Trustee deliberations is restricted and there are a number of provisions to protect and indemnify a Trustee, allowing it the ability to safely litigate the stated provisions of the trust indenture.

The *Trusts (Choice of Governing Law) Act, 1989*, allows a Bahamian trust to provide for a flee clause to export itself to another jurisdiction and also specifically excludes the

application of a foreign law in respect of forced heirship or matrimonial claims to defeat a disposition into a trust.

The *Statute of Elizabeth*, was repealed and replaced by the *Fraudulent Dispositions Act, 1991*. The primary purpose of the *Fraudulent Dispositions Act* is to protect transfers of assets into Bahamian trusts from unknown or contingent creditors. The creditor must prove that the Settlor had a fraudulent intent to wilfully defeat an obligation owed to it by making the disposition to the trust. Any action by a creditor must be commenced within two years from the date of transfer by the Settlor.

Foreign civil judgements, not otherwise statute barred, can be enforced in the Bahamas under the *Reciprocal Enforcement of Judgments Act*. However, that *Act* provides for a list of prescribed foreign jurisdictions from which a judgement may be reciprocally enforced and Canada is not one of the recognized jurisdictions.

Jersey

In Jersey, the main act governing the creation and validity of trusts is the *Trusts (Jersey) Law, 1984*. While this *Act* does not have specified reserved powers for the Settlor, it does expressly permit the Settlor to be a beneficiary and provide for a third party, which could potentially be a Settlor or Protector, to appoint a Trustee to the trust.

The *Act* does not specifically mention the term Protector, but sanctions the inclusion of a third party in the trust indenture to whom, the Trustee may need to seek consent from before exercising a discretion. This could possibly be the Settlor or an appointed Protector.

The *Act* condones a “restriction against alienation” within the trust deed and there are provisions restricting the dissemination of information to Beneficiaries, as well as providing for the export of the trust to a different jurisdiction. Lastly, there are also provisions for the indemnification of the Trustee should it act in conjunction with a third party or attempt to enforce the terms of the trust indenture.

There is no equivalent of a statute against fraudulent dispositions in Jersey, as one has never been enacted and those under English law, such as the *Statute of Elizabeth*, were never incorporated into Jersey law. This means that while there may not be legislated rules assisting creditors in relation to setting aside a Jersey trust, or tracing proceeds in a Jersey trust, there aren't any legislated qualifications or limitation periods either.

Although Jersey does not have as many legislative provisions clarifying its governance of trusts for asset protection purposes, the case *In Re Esteem Settlement*, certainly seems to evidence support for the business in the jurisdiction.

Barbados

Like Jersey, non-resident or international trusts in Barbados are regulated primarily by one act - the *International Trusts Act*, 1 LRO 1998, CAP.245.

However, this *Act* incorporates its own fraudulent dispositions provision that works similar to the Bahamian legislation. A creditor has the burden of proof to show that a Settlor wilfully intended to defeat an obligation owed to the creditor by making the transfer to the Barbadian trust. There is a limitation period of three years from the date of the transfer and local counsel has advised that the *Statute of Elizabeth* has no application to Barbados.

Section 18 of the *Act* states that the court shall not set aside a trust validly created under the laws of Barbados, in relation to the laws of another jurisdiction concerning, marriage, forced heirship or creditor protection in bankruptcy.

There are no specific powers reserved to a Settlor under the *Act*. However, s.26 provides for the recognition of a Protector to a trust governed by the *Act*, which appointment does not expressly exclude the Settlor. The *Act* expressly confers on the Protector the power to appoint the Trustee, change the governing law of the trust or to receive advance notice of specific actions of the Trustee. But keep in mind that notice is not consent.

The Barbados *Act*, like its predecessors above, provides for restricted information to Beneficiaries and for the ability of the trust to change its governing law. It also contains an interesting provision entitled the “presumption against avoidance”, wherein if a trust settlement is silent on being revocable or irrevocable, it shall be deemed irrevocable.

Cayman

The Trusts Law (1998 Revision) primarily governs trusts in Cayman, although most people are also familiar with the *Special Trusts (Alternative Regime) Law 1997*, which deals with non-charitable purpose trusts.

The Trusts Law (1998 Revision) expressly provides for Settlor reserved powers under ss.14(1) and the exclusion of marital claims under s.91. The *Act* sanctions the appointment of a third party in the trust indenture, which can be authorized to appoint and terminate the Trustee of the trust and to consent to investments made by the Trustee, but it does not expressly mention the role of a Protector to the trust.

The *Act* provides for “protective trusts” in the event that a beneficiary should be subject to forceable alienation of his or her trust disposition. It also sanctions the provision of a change of jurisdiction for the trust and offers wide protections for the Trustee in enforcing the terms of the trust.

Fraudulent conveyances to a Cayman trust are dealt with under the *Fraudulent Dispositions Law (1996 Revision)*. This law states that every disposition of property made with an intent to defraud, and at an undervalue, shall be voidable at the instance of the creditor prejudiced. Applications to set aside a disposition must be made within six years of the transfer. However, Cayman trusts may also be subject to *The Bankruptcy Law (1997 Revision)*, which states that any disposition to a trust made within two years immediately prior to the bankruptcy will be void regardless of whether or not the bankrupt was solvent

at the time of the disposition. Further, any disposition made between two and ten years prior to the act of bankruptcy will be void if the Settlor was not solvent at the time the disposition was made.

In order for *The Bankruptcy Law* to apply, the Settlor needs to have some *nexus* to Cayman. However, this *nexus* is achieved at a fairly modest standard. It includes a Settlor who is personally present in Cayman when the act of bankruptcy was committed (i.e. the transfer to the trust); a Settlor who is ordinarily resident in Cayman or has a place of residence in Cayman (perhaps a holiday condominium?); or who does business in Cayman, personally or by means of an agent.

The application of *The Bankruptcy Law* to a trust has already been successfully accomplished in the case of *Grupo Torras v. Butterfield Bank* [2000] CILR 441.²⁰ So while the statute of limitation period under the *Fraudulent Dispositions Law* is six years, a Settlor could be faced with the prospect of dealing with a ten-year period under *The Bankruptcy Law*.

Summary – Would offshore courts uphold their own legislation?

It is my belief that any of the above noted jurisdictions would uphold a trust established for asset protection purposes where the Settlor settled the trust with his or her own funds in good faith without knowledge of an existing claim. This trust would more than likely withstand challenge in the face of provisions providing for the removal and appointment of the trustee by a third party, and the exercise of consent to be required by a third party over investment decisions of the Trustee.

Where it begins to become a little more vague is where that third party is the Settlor as opposed to an independent Protector. In the case where the Settlor wants to be acknowledged as having certain powers over the trust assets or in relation to the Trustee, than the trust is likely better off in a jurisdiction that expressly sanctions reserve powers, such as the Bahamas or Cayman.

Another benefit to the Bahamas, Cayman and Barbados jurisdictions, is the expressed non-recognition of foreign matrimonial or common law relationship rules to the validity of a disposition to a trust.

Legislated limitation periods within which to bring a claim are also comforting, regardless of whether or not a jurisdiction needs them in order to uphold a validly constituted trust. In that regard the Bahamas and Barbados have the best provisions of the jurisdictions considered above.

Canada's Position Regarding APT's

Whether or not a Canadian court would recognize a foreign asset protection trust is debatable. However, the question really becomes what power could or would they exercise in a case where one was settled to subvert Canadian laws?

In *Waters' Law of Trusts in Canada*, Professor Donovan Waters states that constructive trusts have been firmly recognized in the law of Canada.²¹ Constructive trusts are imposed by law to rectify an unjust enrichment. Theoretically, a Settlor in Canada could be deemed to be a constructive trustee in relation to an APT and ordered to distribute trust assets to the deemed beneficiaries, which has been a course of reasoning followed in American courts.²² Cases in the United States have resulted in contempt of court charges and jail sentences for Settlers. But it is unlikely that Canada would follow suit.

Constructive trusts are remedial actions attaching to assets in the constructive trustee's possession, therefore the courts may order the seizure of Canadian based assets in the Settlor's possession, but it is something different to disregard the legal form of another entity and attribute title to assets to someone who does not have it.

Recommendations

- Pick a jurisdiction with a statute of limitations period. Although some jurisdictions claim not to need one, because of their reliance on a solvency test, it is still better to have a specific date past which no creditor claims can be brought.
- Specifically state in the trust indenture that the settlor is excluded from being a trustee. In addition, the settlor should not reserve as one of his or her powers the right to appoint the trustee. That power should be left to a separate party, such as a Protector.
- Make the trust settlement irrevocable and grant as much discretion to the trustee as possible in making distributions. Specific distributions can be seized.
- Limit powers reserved to the settlor as much as possible, but in any event, pick a jurisdiction that specifically states that the powers reserved to the settlor, at hand, are not excessive by their very nature. Keep in mind that a trustee in bankruptcy can exercise those same reserved powers, so the idea is to keep as much discretion in the trustee's hands as possible.
- Advisors in consultation with the client, may consider adding an "anti-duress" clause to the trust indenture, wherein the settlor would become specifically excluded as a beneficiary if he or she was subjected to court proceedings in his or her home jurisdiction.
- Do not dictate instructions to the trustee. Allow the trustee to consider any proposals and act independently. In framing proposals, the settlor should do so verbally. Email directions outside of powers reserved by the settlor are express proof of fettering the trustee's discretion. In fact, the opposite is also true. The written denial of a request by the trustee shows that the trustee is acting independently. It would be useful for the settlor to have evidence of such a consideration and denial on his file, so long as the settlor and trustee do not act in collusion to create such evidence as a deception.
- The assets settled to the trust should as much as possible be custodied in the trust jurisdiction, or if not in the trust jurisdiction, then in a jurisdiction that protects client confidentiality and is not biased towards creditor claims. Switzerland may be a good example. Real estate is almost always a bad asset to hold, from an APT standpoint, unless that property is located in the same jurisdiction as that governing the trust itself.
- Make sure that the trust has a flee-clause, especially if the original jurisdiction chosen has a long statute of limitation period, like Cayman. Some of the other jurisdictions,

like Nevis and the Cook Islands will recognize the trust from inception and may have a statute of limitation period that has already passed.

- Choose a jurisdiction that has enacted confidentiality laws restricting the release of information and better yet, one that specifically legislates in favour of a trustee not divulging any information to beneficiaries or potential beneficiaries of a trust. Treaty countries in this regard, like Barbados, may not be preferable if the creditor is CRA.
- The settlor should swear an affidavit of solvency after the settlement and contribution to the trust and be able to prove same with a financial statement.
- Choose a jurisdiction that has specifically repealed the Statute of Elizabeth or one to which it, or anything similar, has not ever applied.
- If possible the trust should speak to other estate planning objectives other than simply protecting the assets against possible creditor claims. Perhaps the avoidance of probate taxes etc. may be referred to in the preamble. Giving the trust another intention weakens the argument that the Settlor specifically intended to defraud his or her creditors.

¹ Peter Willoughby, *Misplaced Trust*, 1st ed. (Cambridge: Gostick Hall Publications, 1999).

² The Royal Court of Jersey cases are published at <http://www.jerseylegalinfo.je> and a number of case cites can be found on the International Tax Planning Association website, although you will need to be a member to access the content.

³ *Abdel Rahman v. Chase Bank (C.I.) Trust Company Limited*, [1991] JLR 103, at p.114.

⁴ *Id.*, at pp.114-115.

⁵ *Snook v. London & W. Riding Invs. Ltd.* [1967] 2 Q.B. at 802

⁶ *In Re Esteem Settlement* [2003] JLR at 192

⁷ The Supreme Court case as reported in OFLR is heavily edited, so I also used a copy of the case published on a commercial website by Adkisson Publishing, <http://www.assetprotectionbook.com/fapt.htm>.

⁸ *Grupo Torras S.A. v Sheikh Fahad Mohammed Al Sabah, et al* 1994 No.72/1 OFLR 443 at p.3.

⁹ *Ibid.*, at p.6.

¹⁰ *Ibid.*

¹¹ *Ibid.*, at p.2.

¹² *515 South Orange Grove Owners Association v Orange Grove Partners* [1995] CKHC 9; 208.1994 (6th November, 1995), published at <http://www.paclii.org>.

¹³ *515 South Orange Grove Owners Association v Orange Grove Partners* [1995] CKHC 3; 208.1994 (11th March, 1995) at pp. 3-4.

¹⁴ *515 South Orange Grove Owners Association v Orange Grove Partners* [1995] CKHC 9; 208.1994 (6th November, 1995), p.12.

¹⁵ *Ibid.*, at p.17.

¹⁶ *Ibid.*, at p.16.

¹⁷ *United States of America, on behalf of its agency the Federal Trade Commission and A Limited*. Plaint No. 57/1999 High Court of the Cook Islands (Civil Division), published at http://www.assetprotectionbook.com/andersons_cook_isles.htm

¹⁸ *Ibid.*, at pp.1, 6 & 7.

¹⁹ Melissa Langa, "Words are our Business: Understanding the Relationship Between Case Law and the Drafting of Asset Protection Trusts", 14th Annual Symposia – Real Property, Probate & Trust Law, American Bar Association, April 3, 2003, at p. 14.

²⁰ . "Baker & McKenzie Helps Secure Major Victory in Long Running Grupo Torras Litigation", <http://www.bakernet.com/BakerNet/News/Archive/grupotorrasdisputeresolution.htm>.

²¹ *Waters' Law of Trusts in Canada*, (3rd ed. Donovan W.M. Waters, Editor-in-Chief, Mark R. Gillen and Lionel D. Smith, Contributing Editors: Thomson Carswell, 2005), at p. 445.

²² See *In re Lawrence*, 279 F.3d 1294 (11th Cir.2002) or *Federal Trade Commission v. Affordable Media, LLC.*, 179 F.3d 1228 (9th Cir. 1999).

Notice

This paper is intended for information purposes only and is not intended as a substitute for legal advice. The reader is encouraged to obtain qualified professional assistance on any specific matters in which he or she may be engaged.

Copyright - N. Gregory McNally and the Society of Trust and Estate Practitioners
(Toronto Branch) 2006.