TRUSTS AND RELATED TAX ISSUES IN OFFSHORE FINANCIAL LAW

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FOREWORD

Oliver Wendell Holmes, the father of the great judge of the same name, once wrote: 'Put not your trust in money, but put your money in trust.' We can imagine the enthusiasm with which he would have greeted that modern phenomenon, the offshore trust, which is the subject of this excellent new book.

Professor Ross Cranston and I had the pleasure of co-supervising Rose-Marie Antoine's doctoral thesis on offshore financial law, a thesis highly commended by the examiners, part of which later grew into a larger specialist work published under the title Confidentiality in Offshore Financial Law, by Oxford University Press. In that work Dr. Antoine graphically depicted the tension between the desire of offshore jurisdictions to respond to the needs of international business and finance, through strict confidentiality rules, tax advantages, and the like, and the concern of onshore jurisdictions to counter tax evasion and money laundering, and drew attention to the important constitutional issues involved. *Confidentiality in Offshore Financial Law*, a splendid work, is now followed by this second offering from Dr. Antoine's pen, an equally fine text which explores the distinctive characteristics of the offshore trust, an institution combining the traditional trust developed by the English common law with new features designed to protect the trust assets from the claims of creditors, bypass inconvenient rules on succession and counter challenges by onshore jurisdictions.

In this new book Dr. Antoine combines a rigorous analysis of the complex legal issues surrounding the offshore trust with a balanced policy perspective in which she stoutly defends the institution of the offshore trust as a legitimate instrument of estate planning based on freedom of contract and of property while acknowledging that it may be abused and that onshore jurisdictions have legitimate concerns which need to be addressed. The book is wide-ranging, covering matters as diverse as the liability of trustees and the validity of exculpatory clauses, tax implications, the use of human rights law to protect the essential features of the offshore trust, and issues of the conflict of laws, including an examination of the Hague Convention on the Recognition of Trusts. It is at once a challenging work for the scholar and a *vade mecum* for the practitioner, and I have no doubt that it will be welcomed as warmly as its predecessor.

Roy Goode
Oxford
November 2004

PREFACE

The idea or notion of a 'statutory trust' is to some heresy and to others a contradiction in terms. Since the trust is a creation of equity, then statute, by definition, cannot create a trust. Yet, it is precisely what the creators of the offshore trust have dared to do. It is little wonder, therefore, that the offshore trust has been described as a bastard offspring of equity.

This new creation, the offshore trust, is, in many ways, extraordinary. On the one hand, it borrows heavily from the traditional trust, created and fashioned by the principles of equity. Yet, on the other hand, it embodies unique concepts radical to the traditional trust. It has attempted to surmount the forced heirship regime of the civil law. It has created the original entity that is the 'purpose trust'. It has embraced selected principles of company law, married these principles to equity, and created a vehicle for offshore investment. It has attempted to exploit universal principles of tax law which advance tax mitigation. It has promoted the cause of the freedom of disposition of property, even to the extent of prioritizing the interests of named beneficiaries and trust purposes over future, unidentifiable creditors. As the challenge to its existence mounts, its creators constantly seek to reshape it to enable it to adapt to its changing environment. Perhaps the best example of this is the so-called 'VISA' trust, recently created in the British Virgin Islands. All of these innovations and revolutions have been done in the name of commercial pragmatism and viability, to create an efficient mechanism suitable for the modern international business environment.

The fascinating legal framework of the offshore trust and its evolving jurisprudence is the subject of this book. It is a subject with which every trust practitioner and every person associated with the business environment should familiarize themselves. Notwithstanding its obvious usefulness to the practitioner, the very existence of this new trust, the first truly indigenous and carefully planned trust creation of modern times, should be a stimulating topic of inquiry for the academic and the student alike. The book serves also as a companion volume to *Confidentiality in Offshore Law*.

Part I explores the underlying principles of the offshore trust and explains its anatomy and functions. Special trust vehicles are described and examined. Inevitably, one is never far away from either defending or trying to explain the jurisprudential tensions surrounding the offshore trust. This leads to Part II, which focuses on the challenges to the offshore trust, and the common pitfalls encountered by practitioners and others who seek to create such trusts, thereby giving advice as to how they should be avoided. How and why an offshore trust may be deemed a sham is a major subject of inquiry. Great attention is also given to the duties of trustees in managing offshore trusts, potential fraudulent conveyances, the liability of third parties to the trust, and the liability of directors of offshore corporate trustees.

Part III focuses on the offshore tax function. Here, I have chosen to explore, *inter alia*, the responses to the tax function of offshore trusts, the increasingly hostile counter-measures by onshore jurisdictions against offshore trusts, the reaction by offshore jurisdictions, and even the efforts at judicial engineering associated with the offshore tax function. This enables the reader to make a realistic and much needed assessment of how the offshore trust functions in the international tax sphere. Nowhere are the tensions between offshore and onshore jurisdictions more evident than in the tax functions of the offshore trust.

In Part IV, the book seeks to explore the intriguing issues that arise in conflict of laws as they relate to the offshore trust. It is perhaps the first time that this complex and important subject is explored in a major work. This includes new ideas as to how the offshore trust should be approached from a conflict of laws perspective, for example the initial question of the capacity to create an offshore trust. Hence, the ingenuity of the creators of the offshore trust is introduced as they try to create mechanisms through the offshore trust to override conflicts arising from competing legal traditions. Issues of the jurisdiction of the offshore trust, its proper law, and the recognition of the offshore trust in civil law countries invite investigation and exegesis. Perhaps the most fascinating aspect of the efforts of the offshore trust to be accommodated and accepted in the civil law tradition has been its efforts to contend with the principles of forced heirship, an essential initiative if the offshore trust is to be marketed successfully in a global environment.

The book concludes with an examination of two subjects, the capacity to create the offshore trust and the initial transfers of assets, and the non-enforcement of foreign judgments under offshore trust law. These areas of discussion are essential to understanding, and preparing for, the survivability and endurance of the offshore trust.

Offshore law is unquestionably comparative in scope, depth, and character. This alone makes this work comprehensive in the treatment of the subjects and themes selected for analysis. The book examines not only the offshore law current in the several offshore jurisdictions, but also assesses offshore law from an onshore law perspective, including pertinent issues that arise when that onshore law belongs to the civil law tradition.

Rose-Marie Belle Antoine, Saint Lucia
January 2005

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TABLES OF CASES

AUSTRALIA

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BELIZE

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GERMANY

GIBRALTAR

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HONG KONG

ISLE OF MAN

ITALY

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