



TOOTHLESS AND DANGEROUS

The legal historian, Francis Maitland, observed that the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence had been the development of the trust idea. 800 years of development have certainly left their mark. The Lord Chancellor in London has commented on the uniqueness of the trust by reflecting that, internationally, its flexibility was unrivalled in the fields of investment, tax and wealth planning, not to mention a profusion of other applications. However, what concerns me is not the magic of trusts but their management and marketing. Today, the world of trusteeships has become complex with the creation of elaborate strategies and exotic products fuelled, in part, by a plethora of competing offshore financial centres offering a legislative smorgasbord which seems to be in a constant evolutionary state. A person doesn't know where to turn. A fine example is the Asset Protection Trust frequently promoted as being a safe haven; to my mind, all trusts, if properly constructed, should protect the assets. Unforeseen errors, however, can give false hope. Many of these trusts have a boiler-plate deed - cousin to the ubiquitous stationer's will form - which does not necessarily provide for a particular individual's special circumstances. Boiler-plates will remain the soft option for the novice trustee who, more often than not, is also involved in the marketing of the product. Where the two functions are distinct from one another, then at least if a qualified and seasoned trustee is involved he can serve as a safety net by at least attempting to provide remedies or divert disasters resulting from zealous marketing. When professionals are replaced by salesmen who see trusts as the intellectual equivalents of vacuum cleaners then a trust will remain fraught with danger for the client who has an inexperienced trustee flying along on auto-pilot until there's smoke in the cabin. Perhaps the boiler-plate fits the mould but that is still no cause for complacency. Inevitably, the operational arm of the trust is an underlying company - perhaps even a related subsidiary trust or foundation - which manages a considerable portion of the trust assets under the stewardship of, where applicable, a board of directors, other trustees or a foundation council. But the amateur trustee will likely have a blind spot as to the extent of his fiduciary responsibilities in relation to those parts of the structure, however distinct, which have the trust at its centre. A brief study of the U.K. case of *Barlett vs. Barclays Bank Trust Co. Ltd.* is highly recommended to the errant trustee if there is an underlying company whose directors are free to either manage or mismanage the assets under their control. Speculative ventures by the directors which would not be countenanced by the terms of the related trust deed are, nonetheless, tacitly sanctioned by the



auto-pilot trustee. But that auto-pilot can be disengaged unexpectedly by, perhaps, a letter from a law firm following the death of the client, with an opening paragraph along the lines: "We represent the children of the abovenamed deceased who settled an offshore trust, of which you are trustee". Past passive attention to the fictional company's affairs may now have a price-tag: a suit for breach of trust perhaps. Smoke in the cabin.

I wrote an article entitled, "The Order of the Hammer", which appears on this website, dealing with the supervisory skills of the offshore regulator. I felt that not every offshore scandal could be fairly attributed to the practitioners in the private sector, and I explained why. However, the marketing and management of trusts has, in some cases, got completely out of hand. Some of those who are, rightly, only on the periphery of trust management have teamed up with the salesmen after recognising the profit potential and are prepared to take on fiduciary responsibilities as the price for gain. Just as you should weigh the virtues of a jurisdiction against the level of regulatory competence, so should you select the trustee in a jurisdiction by first judging his ability. It is, in my opinion, more important to choose the right trustee than it is the jurisdiction. After all, this is the age of electronic wizardry where - with qualification - the physical location of the trustee becomes more and more academic. But why the reference to the word "hammer" in my earlier article? I think it's worth repeating the allegory. A manufacturing plant manager was faced with a major mechanical breakdown which he was unable to fix and, in desperation, he contacted the retired engineer who had originally installed the machinery. The engineer made a brief inspection after which he asked the perplexed manager for a hammer. After striking a particular pipe, the machine sprung back to life. The humbled manager thanked the old engineer telling him to send a bill for his effort and so the next day a horrified manager received a bill for USD1,000. Asked to explain the prohibitive charge for a solitary hammer-blow the engineer retorted that in fact only USD1 was charged for the hammer blow, whilst the remaining USD999 was due for knowing where to strike the blow. Thus my title, "The Order of the Hammer", or TOOTH for short.

I have concluded during 40 years of being both a regulator and a practitioner working in Africa, Europe, the Caribbean and America, that, fundamentally, experience is all that counts. One disillusioned soul once mused in a classic film that as time goes by the fundamental things still apply; and so it is with trusts. Like the offshore regulator, the offshore trustee should be a member



of TOOTH. Increasingly, a specialised qualification in trust practice is becoming a necessity, as recognised by the Society of Trust and Estate Practitioners in London, and its training programme.

So, if you are confronted by a trustee who believes that a bare trust is associated with nudity, that an express trust is somehow quicker to manage than a normal one and that the three essentials of a trust are a client, his cheque book and a pen, then I would suggest a hasty departure. The right trustee, as I said earlier, is more important than his location. Geographical size is not a factor in relation to an offshore centre's position in the pecking order of popularity. Specks in the middle of a sea can cast a giant shadow, as it were, if the skill is there. No, wherever you find it, practitioner competence is the key. I subscribe to the observation made by Ralph Waldo Emerson: "If a man write a better book, preach a better sermon, or make a better mouse-trap than his neighbour, 'though he build his house in the woods, the world will make a beaten path to his door". If you find yourself either on an arduous journey into Tibet or slashing your way through the Central American jungle seeking professional advice, console yourself with the thought that it will be well worth it if your intended trustee is, shall we say, long in the TOOTH.

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