



TRUST SERVICES, S.A.

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OFFSHORE PILOT QUARTERLY

Ghosts and Hidden Treasure

The start of the new century promises to be tempestuous in the British Overseas Territories. The Foreign and Commonwealth Office in London is presently selecting consultants to undertake a review of the offshore financial services regimes in Bermuda as well as in the United Kingdom's Caribbean territories (Cayman Islands, British Virgin Islands, Turks & Caicos Islands, Montserrat and Anguilla). The contract has been put out for bidding and the selection is expected to be made by January.

Earlier this year, the premier of Bermuda, Jennifer Smith, visited the British Labour Party conference in Bournemouth and spoke to ministers and Members of Parliament about jaded perceptions of offshore regulatory standards. The Cayman Islands, for its part, has pulled all the stops out in its efforts to stave off further criticism, saying that it does not, in fact, have absolute banking secrecy and that because it is a British Overseas Territory, the British police can authorise the disclosure of bank records. The Cayman government is even asking for certification under the United Nations Global Programme Against Money Laundering and has agreed that the UN can undertake its own inspection.

The appearance of harmony between the targeted territories and London over

the imminent review is being actively promoted by the British government. Baroness Scotland (the Minister responsible for Overseas Territories) has referred to a partnership between her government and the territories and has said that the review has received whole-hearted support from all quarters. But many practitioners in those territories see the review as tantamount to jackboot-tactics and will welcome the consultants as warmly as the people of Poland did Hitler. It won't, however, be the intrusive nature of the remit that will be worrisome but, rather, whether the British Foreign and Commonwealth Office runs true to form in such matters. Even if the consultants have a firm grasp of their brief, will they have a firm grasp of the subject matter? Equally worrying will be that if they do, will the British government accept the findings in toto or only select those parts that are politically digestible? Although many official reports produced are personalised by including the name of the putative principal author in the report's title, often the text is changed by one or more ghost writers before the final version is printed. These phantom contributors are never, of course, independent. The Caribbean has been the focus of more reviews than hidden treasure, but whilst the treasure has all been of value, the same cannot be said of the reviews. When one considers the



cost to the British taxpayer during a time when tax evasion is so contentious, is there not a case to be answered by someone for evading the proper use of taxes?

Baroness Scotland has said that the consultants appointed for next year's review (they have also been referred to, impressively, as "independent analysts" and "independent experts") will determine what changes are needed. If she is taken at her word, this means that the whole project's success hinges on the calibre of the consultants chosen. One academic who studied several disastrous irrigation schemes in Africa noted that politicians and bureaucrats had been talked into programmes by well-meaning, but inexperienced, consultants. With the future prosperity of those islands at stake, I can think of no more compelling case for employing poachers (seasoned practitioners) to be temporary gamekeepers in order to achieve an accurate evaluation. A leaf should be taken out of Daniel Thelesklaf's book. He is part of Switzerland's Federal Office for Police Matters in Berne and he is recruiting banking and insurance experts, not policemen, for his Money Laundering Reporting Office of Switzerland.

I hope the British Foreign and Commonwealth Office gets it right, but it has been said that the working of monolithic establishments is mainly the result of a vast mass of routine, petty malice, self-interest, carelessness and sheer mistake. Ominously, the Governor's Residence in the Turks and Caicos Islands is called Waterloo. The stage is set for an almighty battle between the British government and the dependencies, despite those reassuring words from Baroness Scotland.

Espresso, Cappuccino and Ab Initio
Once there was just coffee. It was

either black or white, depending on personal preference. But today things are no longer that simple. Coffee has become very exotic, thanks to clever promotion. We have solo espresso and doppio espresso. Cappuccino has evolved into mochaccino and frappuccino. In other words, the coffee bean has been turned into an art form. It is not alone. The legal and related professions in America, in particular, have done to the trust what a certain coffee chain from Seattle has done to cappuccino. But how much of this transformation in trusts is froth and how much is substance? A trust can only exist when the client intends, in the first place, to give his assets to a trustee and lose control of them. Without this animus, the trust is a fraud ab initio and it is the responsibility of the practitioner, therefore, to explain the ramifications to the client of his intended actions. Usually, following this revelation, there is a high probability that the business will be lost and so a client may be told that provided it is baked properly, it is possible for him to have his cake and eat it (perhaps Cook Islands is an appropriate name after all).

A British law professor commented earlier this year that marketing demands are pushing the trust concept beyond its fundamentals to the extent that its very essence is being eroded, and no where has this become more apparent than in America where foreign trusts are increasingly under attack by the courts. But were these foreign instruments ever really trusts? Was the reference misleading, as it is in China and Taiwan, where there are local trust industries but the reference to trust relates to quasi-retail or merchant banking business? A case of saying one thing but meaning another. Trust experts who have administered trusts



and liquidated deceased estates since record turntables were the norm, CDs were nothing other than bank certificates of deposit and apt was just a word and not an acronym, will tell you that the source of the problem, nine times out of ten, is the practitioners and salesmen (the roles are often combined) who promote asset protection trusts (the acronym should also stand for Aggressively Promoted Trusts) without fully understanding that without the bean, it isn't coffee. The plot thickens when these fiduciary frauds go offshore. Ignoring any differences between English and American law (we may drive in the same direction, but on different sides of the road) those inexperienced American promoters of the omnipresent APT will think nothing of drafting or doctoring a foreign situs trust deed which has English law at its root. Unfortunately, there are numerous offshore practitioners who are more than willing to assist if necessary and whose morality meter is defective. The risk of misinterpretation is high and can have serious consequences. The subtle differences go beyond, for instance, the adoption by American female lawyers of "Esquire" after their names, an appellation in the United Kingdom which is used as a courtesy title after a man's name only - whether he is a lawyer or not.

Is it any wonder that recent cases brought before American courts have shattered the efficacy of some foreign trusts, caused confusion among the public and overloaded internet chat lines? Asset protection is superseding taxes as a motive for foreign trusts so I predict a growing number of court cases all over America. Proper trusts formed for the sole purpose of protecting assets have received the blessing of the U.S. Supreme Court

following its decision in the Grupo Mexicano case. The majority (5-4) recognised, inter alia, that debtors will pursue their own interests and continue to use "sophisticated strategies" to achieve their goals. The Court's ruling is predicated on the trust being real and I wonder how many of these unscrupulous APT merchants setting up, say, Cayman Islands and British Virgin Islands trusts can tell you what the three certainties of a trust under English law are? No, one of them is not: There's one born every minute. Equity to them only relates to the Dow Jones.

Ultracrepidarian is a less-known English word than Esquire, but I think some practitioners should replace Esq. with Ult. after their names, regardless of gender. It means: "acting or speaking outside one's own experience, knowledge or ability".

Coming Clean

British and American officials estimate that about \$500,000 million (2% of global Gross Domestic Product) is laundered through the worldwide financial system annually. Daniel Thelesklaf (the Swiss lawyer - turned gamekeeper mentioned earlier) reckons that it costs around \$300,000 to launder a million dollars. It is easy to see how such fees can tempt the criminals.

The exact interpretation by governments of what activities can be termed money laundering, however, has become subjective - just as the distinction between evasion and avoidance of taxes has. It all depends on which government is providing the definition, but money laundering, in its pure form, is the method by which the proceeds of serious crime (such as drug trafficking) are figuratively washed clean and turned into seemingly legitimate funds. The process has three



stages: placement (conversion into an innocuous form, such as bearer cheques or international money orders) followed by layering (movement of funds utilising various tiers of financial transactions) and, finally, integration, which enables the laundered monies to enter the economy as apparently normal business funds.

The Group of Seven leading industrial nations has set up the Financial Stability Forum which, amongst other things, monitors developments in the offshore financial services centres. Andrew Crockett, the Forum's chairman, has said that the offshore centres must be properly supervised and those that do not pass muster can expect to be named and shamed. But closer to home would not be a bad place to start with the name-calling. In New York about \$10 billion were laundered through the Bank of New York over several years. How awkward for Mr. Moscow of the New York district attorney's office who is a harsh critic of offshore centres. A sample of British bank notes examined by Mass Spec Analytical found that 99% of them were tainted with cocaine. The sample had been provided by the Bank of England. I hope nobody mentioned that to General Barry McCaffrey, the U.S. drug tsar, when he visited London recently.

We have a global, not just an offshore, problem and less mainland hypocrisy would help.

Panamania

In a recent survey by The Fraser Institute the extent of economic freedom in 123 countries was measured. In general terms, the survey considered factors such as meddling government regulations, trade barriers, expropriation, inflation and restriction of movement of capital. Hong Kong

was rated number 1 as having the greatest degree of economic freedom, Myanmar the least. Panama was number 11 from the top, beating countries such as Luxembourg, Taiwan, Brazil and Germany. If the survey had only measured a citizen's level of economic privacy, however, Panama would have had few rivals for top position. Anyone who has read this newsletter since 1997 will understand why. How symbolic that the Statue of Liberty is located offshore: that's where unfettered rights to privacy will be found in the next century.

If you are one of those people who subscribe to the belief that the two most common elements in the known universe are hydrogen and stupidity, then the recent controversy surrounding the control of the Panama Canal in the next century, once America hands it over, will come as no surprise to you. A 250,000-name petition has been delivered to Capitol Hill in Washington because of fears in some political quarters that Communist China is waiting in the shadows to replace America's influence and muscle with its own. Newspapers have picked up on this mania and, predictably, the issue now has a life of its own. Some reporting suggests that certain journalists have heeded Lord Northcliffe's words that in journalism you should never lose your sense of the superficial. America has the terms of the canal treaty and the military capability to protect both its interests and those of the West. If put to the isthmus – rather than litmus – test, there is no doubt that the political hue in Panama would not change to red.

I wonder if those petitioners in Washington know about the oranges? The State of Florida is opening an office in Beijing to promote the sale of its citrus after China lifted sanctions for



citrus from Florida and some other states. Could it be that pockets of Chinese influence in America will emerge from pockets of oranges? Some of those oranges could even pass through the Panama Canal. Surely

here's something, I would have thought, that would have turned the faces of those Capitol Hill protesters – unlike the political landscape in Panama – red?



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