ASSET PROTECTION TRUST BELIZE OFFSHORE

The Enactment of the Belize Asset Protection Trust Act 1992 was a much anticipated event. Word had got around that a new piece of trust legislation was in the works in Belize and a great deal of enthusiasm was generated by the prestigious names associated with its creation. Mr. Milton Grundy, President of the International Tax Planners Association, and Dr. Phillip Baker of Gray's Inn Chambers in London led a blue ribbon panel of draftsmen, including Allen & Overy in London and several tax and estate planners in the U.S., in designing the Act.

The Trust Act itself was well received. Reviewers were enthusiastic. One review described it as "**perhaps the most advanced trust legislation in the world**.", and for many practitioners **Belize became the jurisdiction of choice for domiciling asset protection trusts**.

For all its apparent success, however, the Belize Asset Protection Trust Act 1992 remains largely misunderstood technically by practitioners (and in particular its offshore asset protection provisions). It is not uncommon, for instance, for commentators, especially those doing fairly superficial reviews, such as multi jurisdictional comparisons, to list Belize as a Jurisdiction that has not repealed the so called "law of fraudulent conveyances" as it relates to trusts created in Belize. In fact, the exact opposite is true, the Belize Trust Act expressly excludes the operation of this law. This, moreover; is just one of the many misconceptions that have gained currency regarding the Act and its operations; other examples abound.

The misconceptions: are, however, entirely understandable - arising, as they do out of two complicating circumstances. The first is that the Trust Act presupposes an intimate familiarity with the common law and statutory background against which it was enacted. The second is that the innovative approach that the drafters adopted is so straightforward that it disorientates many practitioners.

To understand, for example, how **the Act deals with the issue of fraudulent conveyances**, it is necessary first to appreciate that the law of fraudulent conveyances was not and is not now a part of English Common Law as it was received in Belize. The law of fraudulent conveyances is entirely a creature of statute. At Common Law a transfer of property could not be set aside on the grounds that it was effected to defeat the claims of creditors. It took an Act of Parliament, acting under the persuasion (some would say "duress') of powerful banking interests, to grant creditors this remedy. The Statute of Elizabeth, as it is now called, created the first fraudulent conveyance law in 1571.

To exclude the operations of the law of fraudulent conveyances, therefore, it is not necessary to amend or exclude any of the common law, it is necessary to exclude only the operations of this particular statute. In Belize, the relevant provisions of the Statute 0f Elizabeth were re-enacted into Belize Law by Section 149 of the Law of Property Act.

The Belize Trust Act expressly excludes trusts created in Belize from the operations of this Section. Subsections (6) and (7) of Section 7 the Asset Protection Trust Act provide as follows.

7 (6) where a trust is created under the law of Belize, **the court shall not vary it or set it aside or recognize the validity of any claim against the trust property pursuant to the law of another jurisdiction or the order of a court of another jurisdiction** in respect of:

- the personal and proprietary consequences of marriage or the termination of marriage.
- succession right (whether testate or in-testate) including the fixed shares of spouses or relative; or
- the claims of creditors in an insolvency.

Subsection (6) above shall have effect notwithstanding the provisions of section l49 of the Law of Property Act, section 42 of the Bankruptcy Act and the provisions of the Reciprocal Enforcement for Judgments Act.

As noted earlier; section 149 of the Belize Law of Property Act (which is excluded by section 7(7) of the Asset Protection Trust Act) re-enacts the provisions of the Statute of Elizabeth. To a reader familiar with the statutory and common law background against which the Belize Trust Act was enacted it is immediately obvious, therefore, that a trust created under the law of Belize is excluded from the provisions of the law of fraudulent conveyance (as regards claims arising under any foreign law).

Subsection (2) of Section 7 of the Asset Protection Trust Act is a further source of misconception amongst practitioners. This section provides that a trust shall be invalid and unenforceable to the extent that the court declares that the trust was established by duress, fraud, mistake, undue influence or misrepresentation. Here to, a reader familiar with the law of Belize will recognize that "fraud" in this context means "an action of deceit at common law". It is distinct from the statutory provisions originally enacted in the Statute of Elizabeth and now contained in the

Belize Law of Property Act, which render void-able voluntary conveyance made with intent to defeat creditors.

The other circumstances that has resulted in misconceptions regarding the Belize Trust Act is, as noted, the radical and innovative approach of the drafters of the Act. Practitioners who are familiar with having particular issues addressed in a particular way in the trust legislation of other jurisdictions are disoriented by Belize's departure from traditional solutions.

Thus, for example, **most of the offshore asset protection trust jurisdictions attempt to deal with fraudulent conveyance claims by mandating a statutory limitation period and imposition of other procedural requirements for the prosecution of such claims**. **The period may vary from six years (the standard limitation period for most actions) to two years** in the case of more aggressive offshore asset protection jurisdictions such as Nevis, the Turks & Caicos and the Cook Islands. In effect, in these jurisdictions the law of fraudulent conveyances continues to apply to trusts created in the jurisdiction, subject however to time constraints – in effect a half-way house approach.

Recent judicial decisions in the Cook Islands and the Commonwealth of the Bahamas have demonstrated the hazards of this approach. In 515 s. Orange Grove Owners Association v. Orange Grove Partners, the Cook Islands Court interpreted the limitation of actions provisions in their so called "Statute of Elizabeth Override Legislation", i.e. the International Trust Act of 1984, in a way that stunned practitioners.

The case turned on the question of whether the relevant statutory limitation period started to run (a) from the date the trust was created, or (b) from the date on which the judgment which it was sought to enforce against the Settlor was issued. The court on a preliminary application for an interim injunction held that the limitation period started to run from the latter date (enforcement action). After reversal by the High Court, this decision was confirmed by the Court of Appeal. In delivering the decision of the Court of Appeals, Sir Duncan McMullin said, "it should not be lightly assumed that parliament intended to defeat the claims of creditors by allowing international trust to be used to perpetuate a fraud against a creditor". The Court also commented: "we would be loathe to interpret the International Trusts Act as a statute which was intended to give succor to cheats and fraudsters by totally excluding the legitimate claims of overseas creditors. We cannot think that parliament ever intended that by passing the International Trusts Act the Cook Islands should become the Alsatia in the South Pacific from which the commercial comity of nations was completely ousted. "This dicta, particularly the reference to "cheats and fraudsters", suggests that the learned Judge of Appeals failed to distinguish in his mind between common law fraud, i.e. deceit, on the one hand, and a transfer to defeat the claims of creditors on the other. This failure resulted, in great measure, from the half-way house approach adopted by the drafters of the (Cook Islands) International Trusts Act.

One commentator noted, "this holding goes a long way towards gutting the Cook Islands legislative scheme, because it gives creditors who first obtained a judgment in the United States the ability to sue on the judgment in the Cook Islands, without being barred by the "Statute of Elizabeth Override". The effect of this decision has been considerably mitigated by subsequent legislative events in the Cooks. Nonetheless, the case does illustrate the hazards of adopting the traditional statutory limitation period solution to the fraudulent conveyance issue.

A similar problem arose in the Bahamas which has also adopted a half-way house approach to The Statute of Elizabeth. In Grupo Tomas v. S.F.M. Al – Sabal, Chemical Bank & Trust (Bahamas) and Private Trust Corporation, the case turned on the same question, i.e. whether the statutory limitation period had expired before action was brought. In refusing to discharge an interlocutory Mareva injunction against the assets of the "Bluebird Trust", (a trust created under the law of the Bahamas by one Sheikh Fahad), senior Justice Joan Sawyer said: "aside from the fact that there is no evidence that the Bluebird Trust was established to avoid or minimize Sheikh Fahad’s or his family’s exposure to taxes either in England or in Kuwait, it seems to me that it is one thing to ascribe to the parliament of the Bahamas an intention to make the Bahamas more attractive as a "tax haven" by encouraging the establishment in this jurisdiction of what is referred to in some commercial circles as "offshore asset protection trust". But it is quite a different matter to attribute to parliament an intention of allowing the Bahamas’ position as a legitimate tax haven to be used as a cover for fraudulent activity which has little or nothing to do with a minimization 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."

While senior Justice Sawyers comes much closer than does Sir Duncan to recognizing the distinction between fraud at common law and statutory conveyances, i.e. transfers to defeat the claims of creditors, the distinction is still not clearly drawn. Here too, the failure clearly to make this distinction arises from the decision of the Bahamas Parliament merely to limit rather to exclude altogether the operations of Statute of Elizabeth as it relates to trusts.

Belize Asset Protection Trust Removes Fraudulent Conveyance Invalidation Argument

Belize, on the other hand, adopts an entirely different approach. **Rather than applying a statutory limitation period to the Statute of Elizabeth provisions, it excludes these provisions altogether**. In this context the question of whether the Settlor intended to defeat the claims of the creditor is irrelevant. In the absence of actual fraud, i.e. deceit, in the establishment of the asset protection trust, **the assets of a Belize trust cannot be attached to satisfy the judgment of a foreign court based on any foreign law. This is so even if the transfer is done with the specific intention of defeating the claims of creditors, and whether the claim and/or the judgment arose before or after the trust was created.**

This unequivocal position of the Belize legislature is of great assistance to judges who have to consider specific applications of the Belize Asset Protection Trust Act.

In Securities and Exchange Commission v. Banner Fund International the U.S. SEC. Applied for an order to compel the trustee for a Belize trust to disclose information and surrender certain assets of the trust. On the substantive hearing of the application the Supreme Court of Belize refused the order on the ground (inter -alias) that the application contravened the relevant provisions of the Belize Asset Protection Trust Act.

Mr. Justice Traodio J. Gonzales noted: "…the Asset Protection Trust Act goes to great lengths to reserve jurisdiction over Belize trust to the Belize Courts. Section 7(2) of the Act provides that only a Belize Court has the power to declare a Belize trust invalid. By section 7(6), Belizean Trusts are granted specific immunity against the judgments of foreign courts or claims based on the law of any foreign jurisdiction. In a jurisdiction, such as Belize, which offers international investors confidentiality and protection of their assets against foreign litigants and which has passed law towards those ends, it is important that judges, mindful of the legislature's intention as set out in the law, support these principles of confidentiality, inviolability and exclusivity of jurisdiction".

Clearly, a Belize judge, buoyed by the unequivocal exclusions of the operations of the Statute of Elizabeth that obtains in the Belize Act, can afford to be bolder in rejecting "fraudulent conveyance" claims based on foreign law than can his colleague in jurisdictions that merely limit rather than exclude altogether the Statute.

Understanding the operations of the Offshore Belize Asset Protection Trust Act (and particularly its asset protection features) requires both detailed knowledge of the legal background against which the legislation was enacted, and the careful study of those features of the Act that depart from traditional solutions. As recent judicial decisions have demonstrated, however, the advantages conferred by the Belize Asset Protection Trust Act may well be worth a detailed study of its innovations.

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