THE OFFSHORE TRUST: A VERY BRITISH INDUSTRY

by Milton Grundy

I remember attending a conference on offshore tax planning – this was some time ago, when "off-shore" was written with a hyphen. The speakers talked about new and exciting things – flee clauses, participation exemption (*non bis in idem*), but – most interestingly – about the offshore trust. This, said one speaker after another, would be the basis of an international industry on an immense scale. In the audience were two men from the Inland Revenue and one from the Foreign Office. The lunch break came. The Revenue men stayed in the lecture hall, talking gravely to each other. But the man from the Foreign Office was in the bar, buying gins.

We do not know to what extent people at the Foreign Office gave general encouragement to the development of the offshore trust industry. Evidently, they did nothing to prevent it. Most of the jurisdictions hosting offshore trusts were (and some still are) British colonies for which the Foreign Office is directly responsible – and they include the Crown Dependencies, which, self-governing as they are, could never have become tax havens if the Westminster government had not wanted them to. My hunch is that the Foreign Office saw the offshore industry as something to be actively encouraged – as a way of preventing bits of the Commonwealth from asking for money. About one such territory I have some inside knowledge.

The Cayman Islands were formerly part of Jamaica. They consist of three small islands between Jamaica and Cuba, some 300 miles North West of Jamaica. Jamaica was a British colony, which became independent in the 1960s. The Cayman Islands

had little agriculture and no industry. The territory kept alive by providing seamen for Panamanian-registered ships. The Jamaicans – quite rightly – saw the Islands as a liability, and they persuaded the British to retain them as a colony. The Islands did, however, have one asset. The legend is that a close relative of George III was shipwrecked nearby (whether by intervention of the Islanders or not is uncertain). He was rescued, without, it is said, a drop of salt water to stain his silk trousers, whereupon the King declared that the Cayman Islands should be free of tax in perpetuity. And so they are to this day. They also had a hidden asset – hidden, in the sense that it had not been previously commented on. And that was, that because Jamaica was regarded as settled and not acquired by conquest or treaty (a thesis the history of the matter leaves very much open to doubt), the English had brought their common law with them, including the rules of equity, so that the concept of the trust was already part of the law in Cayman.

In 1966, I was instructed by the Attorney-General in Cayman – there was one, and he doubled as the Judge when required – to draft a trust law. The Governor had obtained the approval of the Foreign Office for the establishment of an offshore financial centre, and he gave me a copy of the trust law of St Kitts, to use as a precedent. I understood that the new Law was to be to some extent a marketing tool. (There is nothing very odd about that: think of Income Tax Act 2007 s.475.) No doubt the main market for the Cayman trust would be practitioners in the United Kingdom and other common law countries. But what about civil law countries? Practitioners there often have difficulty in coming to grips with the concept of a trust: its main shortcoming is that it is not registered. For the civil law practitioner, registration seems to have an ontological significance quite foreign to the common lawyer. The civil lawyer is himself registered. His partnership is

registered. His dog is registered. Perhaps he would be more comfortable with a trust if it too were registered. Part VI of the Trusts Law in Cayman would offer the settlor the opportunity to create either a registered trust or an unregistered trust, as he wished.

My draft was enacted by the local legislature, in the form I submitted it, as the Trusts Law 1967, (including a conspicuous, and embarrassing, spelling mistake). The subsequent history of this Law is not part of my narrative. (It led to an amendment of the then Income Tax Act in the United Kingdom, but it is still part of the law of the Cayman Islands, including the spelling mistake, and retaining the controversial and little-understood provisions of section 83).

The Governor also commissioned a companies law – an early version of the later hugely popular international business company legislation in the BVI. With these laws in place, the stage was set for the transformation of an unwanted territory into a spectacularly successful locale for zero-tax trusts and companies. The Governor was less fortunate in his other project, which was to re-establish the turtle in the surrounding waters. He imported turtle eggs from Nicaragua. When the baby turtles hatched, he set them free in the sea, whereupon they all swam back to Nicaragua. But times, and attitudes, have changed, and nowadays many people think turtles should be encouraged to swim where they please, but offshore trusts should be discouraged. Indeed, in the United Kingdom, the ferocious tax regime which affects settlements made by UK taxpayers has led some UK practitioners to dismiss the offshore trust as a yesterday vehicle. But an offshore trust does not have to be a settlement, and the Cayman Islands are now marketing private trusts after the pattern of the unit trust, which are breathing a new life into the offshore trust industry.