



## PROTECT YOUR ASSETS WITH AN OFFSHORE TRUST

By PETER J. MERRICK and ANDREW ROGERSON

**Turquoise seas, pristine coral, endless, near deserted white sand beaches with iconic palm trees** — a holiday dream for most bankruptcy lawyers and their clients. But, this became a reality for me many years ago, when I was briefed to appear in the Court of Appeal, in a then, little known, but quite exotic tax haven. I stayed. And went on to help clients establish and defend structures that put their hard earned wealth out of harms way. Away from vexations, litigants and hostile spouses. What follows is an overview of asset protection using some of the more popular tax havens.

As a preliminary point though, I should say, that prior to considering any form of offshore structure, one should always look first at structuring within your own country.

Domestic structures may be appropriate in terms of ease of establishment and cost. Since asset protection and tax structuring may be available onshore, you should always look, initially, at means of achieving your ambitions within the domestic context.

### JURISDICTIONS

There are many offshore jurisdictions in which a trust may be established. Some are extremely successful. For example, Cayman is the worlds 5th largest banking centre with \$1.3 trillion in deposits, of which \$935M are interbank bookings, not personal or corporate accounts. The British Virgin Islands (“BVI”) are home to 700,000 offshore com-

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panies. Bermuda enjoys the third highest per capita income in the world, US\$70,000 compared to US\$43,500 for the US. The Turks and Caicos Islands, whilst smaller, is a niche jurisdiction, offering friendly and efficient boutique services against a backdrop of wonderful beaches and fine hotels. Many Offshore Finance Centres (the new name for “tax havens”) are current or former British Colonies and / or associated states located in the Caribbean, North Atlantic and the Channel Islands. They are characterised by the following:

- Zero or minimal income tax;
- Legislated bank secrecy;
- A legal system based on English common law with a generally independent and non corrupt judiciary;
- Strict regime of supervision by financial services authorities, generally headed by experienced non-local people (which require trust companies and banks to maintain heavy insurance cover).

Most of the offshore jurisdictions provide similarly attractive regimes, so the decision as to which one to use will, to a degree, depend on personal preference. Skilled and efficient trustee and corporate services are available in most of them. One important factor in selecting a jurisdiction is the ease with which you can travel there. In the modern telecommunications era, it is not essential to ever step foot in the jurisdiction. However, there is much to be gained by making at least an initial visit to familiarise yourself with the jurisdiction in general and the trustees in particular. This consideration may make the North American investor select the Turks and Caicos Island or the Bahamas over, say Lichtenstein or the Cook Islands. Ease of communication, with regard to time zones is also a very important factor to consider.

### ASSET PROTECTION

Historically, trusts evolved as a means of protecting assets. This was achieved by having another trusted person hold legal title to assets on behalf of (or in trust for) another. Tax considerations aside, which I will deal with below, asset

protection is still far and away the most important reason for establishing an offshore trust. People of substantial means who are, or may be, at risk in the future from unwelcome litigation should give consideration to establishing a trust. Once assets are transferred into the name of the trustees then, after a prescribed period, creditors are no longer able to execute against such assets. This is because the Settlor has divested himself of legal ownership. Asset protection may be obtained by establishing trusts both in your home country and offshore. The advantage of establishing a trust in one of the offshore finance centres is their prevalent debtor friendly regimes. These shorten the period of time in which a creditor may bring proceedings to attack the establishment of the trust or settlement of specific assets into the trust. The jurisdictions range geographically from the Bahamas to the Cook Islands. Trusts established in the debtor friendly jurisdictions are typically referred to as Asset Protection Trusts.

The Cook Islands provides considerable hurdles for a creditor to overcome. First, he must seek the leave of the court in Rarotonga to bring the action. Secondly, if leave is granted, he must prove beyond reasonable doubt (the criminal standard) that the transfer into the trust was made with the intention of defrauding a creditor. No action may be brought in respect of any transfer that took place before, or more than two years, after the cause of action arose. If the settlement takes place within the two-year window, then the creditor must bring an action in the Settlor’s home jurisdiction within 12 months of the transfer of assets to the Cook Island trust alleging some sort of debt or damages. He must then commence a further action in the Cook Islands’ courts within two year of the transfer of assets into the trust. If the creditor does not comply with both of these limitation periods, then the claim will be statute barred.

The Cook Islands marks the high water mark of debtor friendliness. Caribbean jurisdictions such as the Turks and Caicos Islands have similar regimes but are slightly more neutral. In the Bahamas, The Fraudulent Dispositions Act 1991 establishes a 2-year limitation period for creditors’ attacks on asset protection trusts; the attacker has to prove fraud against the settler. Even if fraud is proved, benefi-

ciaries who have received bona fide benefit from the trust are permitted to retain what has been distributed to them. In Barbados, creditors have three years to apply to set aside the terms of a trust. An intention to defraud, on the part of the debtor, must be established. A successful creditor can only set aside such parts of the trust as have caused him prejudice, not the balance.

Once established, as indicated above, legal title rests with the trustees and the settlor. His family may become beneficiaries and entitled to receive discretionary distributions, but, with a properly established trust, there is no right on the part of the beneficiaries to require payments to satisfy their creditors. Accordingly, execution against such a beneficiary could prove fruitless.

Some of the advantages of utilising offshore trust for asset protection purposes include the following:

- The geographic distance between your home country and the offshore centre makes an action against the trust more difficult to pursue. To use an extreme example, the distance, as the crow flies, between Calgary, Alberta and Rarotonga, Cook Islands is 11,670km. To fly there from Calgary takes a minimum of 24 hours in the air changing planes in Los Angeles and Papeete, French Polynesia.
- Foreign judgements normally are not recognised in offshore jurisdictions. A plaintiff will therefore have to litigate the entire action afresh in the offshore court, always assuming that the offshore court agrees to accept jurisdiction, which it may not.
- Should the action be permitted, then substantial costs will be incurred in prosecuting the action offshore.
- Time zone differences make it difficult to speak to lawyers by telephone. Distances preclude satisfactory conferences and briefing of witnesses ahead of travel to the offshore juris-

diction. Lawyers' hourly rates may be substantially higher, owing to the difficulty of attracting lawyers willing to practice in such locations.

- It will be logistically difficult and expensive to transport witnesses to give evidence.

Laws governing the trust will be those of the offshore jurisdiction. The laws of the offshore jurisdiction are likely to be much more favourable to the debtor than the creditor. Generally, the self-interest of an offshore finance centre is best served by a legal regime that upholds the sanctity of a trust under attack from disgruntled creditors of the settlor. In most offshore finance centres, a high proportion of the population is employed in the trust and banking sector. Allowing trusts to easily collapse ultimately leads to the destruction of an important industry. Overseas investors will be unwilling to have their trust administered in a jurisdiction that allows the interests of overseas creditors to prevail.

The net result is to discourage frivolous lawsuits and to encourage reasonable settlement offers from more legitimate complainants.

**FREEDOM FROM PROBATE (IMPOST AND CONFIDENTIALITY)**

Upon death, details of assets that have to be probated become a matter of public record. There is no requirement to make public details of assets that one settles into trust prior to one's death. Probate fees (however described) are charged in most cases on the value of assets probated on death. These charges cannot be levied if the assets are already settled into an inter vivo trust, as the assets no longer form part of the deceased's estate.

**EASE OF ADMINISTRATION OF ASSETS AND CONTINUITY**

One problem that manifests itself, particularly in the context of family businesses, is that of ownership of shares in the holding corporation by siblings, irrespective of their knowledge of the business and involvement in its day-to-day activities. For example, one child may have dutifully entered the family business upon completion of his education. Another may have pursued a career as a musician. It is unlikely that the latter sibling will be able to make the same contribution to business discussions as the former.

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## OFFSHORE JURISDICTION COMPARISON CHART

In international trade and investment the selection of an offshore jurisdiction requires very careful consideration. It is important to select a jurisdiction that is well suited to specific corporate and personal needs. Most offshore jurisdictions are free from foreign exchange controls and have introduced company legislation to cater for a diverse range of international business requirements.

Below is a chart which compares some details of various offshore jurisdictions around the world.

Jurisdiction	Type of company taxation	Min. No. of SH	Min. # of Directors	Corporate director permitted	Disclosure of Dir. & SH	Bearer shares permitted	Req. to submit accounts
Bahamas	IBC, None	1	1	Yes	None	No	None
Belize	IBC, None	1	1	Yes	None	Yes	None
British Virgin Islands	IBC, None	1	1	Yes	None	Yes	None
Cayman Islands	Exempt, None	1	1	Yes	None	Yes	None
Cook Islands	International, None	1	1	Yes	None	Yes	None
Cyprus	Resident, Non Resident, 10%	1	1	Yes	Yes	No	Yes
Gibraltar	Non Resident	1	1	Yes	Yes	Yes	Yes
	<b>Exempt</b>	<b>1</b>	<b>1</b>	<b>Yes</b>	<b>Yes</b>	<b>No</b>	<b>Yes</b>
Hong Kong	Private Limited, Nil on foreign profits	2	2	Yes	Yes	No	Yes
Ireland	Resident, 25-28%	2	2	No	Yes	No	Yes
Liechtenstein	AG, .1% Cap.Tax, 4% Dividend Tax	1	1	Yes	Yes	Yes	Yes
Madeira	SA, None	3	3	Yes	Yes	Yes	Yes
	<b>Limited, None</b>	<b>1</b>	<b>2</b>	<b>No</b>	<b>Yes</b>	<b>No</b>	<b>Yes</b>
Malta	IHC, Credits/ Refunds	1	1	Yes	Yes	No	Yes
	<b>ITC, Credits/ Refunds</b>	<b>2</b>	<b>1</b>	<b>Yes</b>	<b>Yes</b>	<b>No</b>	<b>Yes</b>
Nevis	NBCO, None	1	1	Yes	None	No	None
Panama	Non-Resident, None	1	3	Yes	Yes	Yes	None
Samoa	International, None	1	1	Yes	None	Yes	None
Seychelles	IBC, None	1	1	Yes	None	Yes	None
St. Vincent	IBC, None	1	1	Yes	None	Yes	None
Delaware USA	C Corp, Various	1	1	No	None	No	Yes
	<b>LLC, None</b>	<b>2</b>	<b>1</b>	<b>No</b>	<b>None</b>	<b>No</b>	<b>None</b>

This information provided by Company Express Group ([www.company-express.com](http://www.company-express.com)), \*Shareholders

The primary reason for setting up an offshore trust should be asset protection. Offshore trusts are unlikely to be of assistance in making any substantial saving of income tax.

Also, health or psychiatric problems may hinder family members, who have the best intentions, from properly exercising their rights as shareholders. Family disputes and lack of capacity can frequently bring down a family business. An offshore discretionary family trust can be used to overcome these problems. Ownership of shareholding is vested in the trust. The trustees decide who shall sit on the board of directors. The trust receives dividends paid by the company. The trustees then distribute income received by the trust from the company according to the need of the beneficiaries, having regard to their duties as trustees, which require them to act in an even handed manner. Further, upon the death of any family member, there is no issue pertaining to transfer of ownership of shares. The interest of the deceased in the trust is transferred on, according to the provisions of the trust deed.

### PERPETUITY PERIOD

In some countries, there are remnants of what is known as the Rule against Perpetuities. A complex rule that serves to limit the duration of a trust, by requiring that an interest thereunder vest within the period of a life in being at the date of settlement plus 21 years. Although modified by statute, the rule can lead to a lack of certainty and a shorter duration for the life of a trust than is desired. Most offshore jurisdictions have codified their trust law to provide for a fixed term for trusts, typically, 80 years. In 2004, the Bahamas extended their perpetuity period from 80 to 150 years. In 2006, Jersey amended its trust law to provide for trusts of unlimited duration.

### POLITICAL STABILITY

Many North Americans have fears as to the complexion of future governments and prefer the prospect of having assets held in a trust based in, say, The Isle of Man, which is politically stable and conservative. The legislature of this country, The Tynewald, is 1,000 years old, making it the oldest parliament in the world. The “offshore” world now

is accepted as including Switzerland, whose political confederation dates back to 1201. It has also enjoyed legislated neutrality in international conflicts since 1815. The trust industry is prominent in both countries

### TAX SAVINGS

The primary reason for setting up an offshore trust should be asset protection. Offshore trusts are unlikely to be of assistance in making any substantial saving of Income Tax. However, there are other structures that will achieve this end in appropriate circumstances, which I will discuss in future articles.

### WHICH JURISDICTION IS BEST FOR YOU?

Make a shortlist of jurisdictions that have the asset protection regime and professional services you and your adviser feel comfortable with. Go and have a look. Find out which jurisdiction leaves you with a good feeling. Sample the beaches, hotels and restaurants in the context of an easy plane ride from your country of residence. Then choose a place that you enjoy going to, so that meetings with trustees and bankers are a pleasurable experience. *W*

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