A QUESTION OF CONSCIENCE

I was pleased to read that there is still a scattering of practitioners who, like me, use a fountain pen; ink in a bottle and blotting pads have fared less well, it's true, but thank heavens innovation has not completely consigned them to history and you can still get your message across without the aid of any gadgets.

What worries me, however, is the degree of innovation to which the more international version of the English trust has been subjected. One British law professor has commented that marketing demands was pushing the trust concept beyond its fundamentals to the extent that its very essence was being eroded. It follows, naturally, that complexity equates to costs, so lawyers gain an advantage on the principle that in the kingdom of the blind the one-eyed man is king; a general truth in this specialised branch of the law. Marketing, on the other hand, and in the case of a few international financial centres, competitive imperatives, too, are corrupting trusts to the point where the question could be asked: is this instrument really a trust? It can open the door to sham trusts. We have seen the foundation uprooted and, for marketing motives, transplanted to several common-law jurisdictions. Will this civil-law interloper suffer the same fate? I have little doubt.

Trust practitioners like myself who have regulated the trust business, drafted trust laws, as well as administered trusts and liquidated deceased estates since record turntables were the norm – despite a resurgence due to them being discovered by a new generation – have to contend with the non-professional practitioners and salesmen (the roles are often combined) who promote APTs (the acronym can equally apply to Aggressively Promoted Trusts, as it does to Asset Protection Trusts) without fully appreciating that a real trust (where assets will no longer be controlled by the donor) is first created in the mind of the settlor and then subsequently brought to life in written form. Unlike in America, the British trust has, historically, been defined as a relationship, and not a contract, between two parties. History is the key.

During seminars at Jesus College in Oxford I have emphasised during past presentations the importance of removing (or at least reducing) complexity in financial services wherever possible. When it comes to trusts I contend that if a trained trustee has a well-rounded set of morals to aid his judgment, and a keen sense of natural justice, his decisions in times of tribulation will likely be endorsed by the courts.

The roots of the English trust, after all, reach deep into the principles of equity, although centuries before the world heard that word, Seneca the Elder had identified the meaning of equity, expressing himself in a simple but clear way: "Certain laws have not been written but they are more fixed than all the written laws"; the professional trustee understands this distinction in relation to equity and the common law. The eminent British judge, Lord Diplock, once said that the beauty of common law was that it was a maze and not a motorway; if you cannot exit the maze, however, equity is there to help because it is concerned with finding solutions in cases where legal remedies are either unavailable or would be patently unfair if applied and could cause undue hardship. One so often hears the comment that there is the law, and then there is justice; both are not the same. We have an abundance of examples in the 21st century.

Equity developed in feudal England in the King's Chapel, which was charged with issuing official documents, such as royal writs. The post of Chancellor, a state official, by the 14th century included being a chief adviser to the King, serving as the head of the affairs of state and, as some put it, the King's

conscience. This responsibility for issuing writs for use in the royal courts sometimes made him aware of the unfairness and failings of the common law and this would lead him to grant relief to a petitioner. During the 15th century this practice had evolved into a Court of Chancery which provided judicial relief to those who had lost their way in Lord Diplock's maze. Common sense alone came to the rescue of common law.

The Chancellor was guided by his moral conscience, not by law books, and indeed he did not refer to previous legal decisions or rules but followed the procedures of the ecclesiastical courts, which is not surprising, as he was not a lawyer but usually a senior clergyman, such as a bishop. Consequently, in the early stages of the Chancery court's development the Chancellor did not consider that he had any judicial jurisdiction, being independent of the courts of common law. But following the appointment of Lord Nottingham as Chancellor in 1673, who set about having the principles and rules of equity incorporated into a system, it became the practice to appoint a prominent lawyer as Lord Chancellor.

Although I advocate training for your trade and preparation for your profession, there are instances where extremes arise and when judgement is bullied by bureaucracy – not to mention professional protectionism. Philosophy is a fine case in point and which only became a profession during the last few centuries. Both Socrates and Baruch Spinoza were neither professors nor tenured dons, anymore than England's ecclesiastical courts, which applied the virtues of equity, were peopled by lawyers. The measured judgements required, however, did not necessarily need lawyers, just men who emulated Socrates and Spinoza and possessed to some degree a combination of common sense and tolerance which, together with a compassion for the human condition, infused their thought.

More recently previous presumptions on countless subjects are being questioned, if not found to be wrong. University, for example, does not offer the single, solitary path to knowledge and vocational training is a comparable alternative. After all, when the judge's toilet malfunctions badly, it's the tools of the plumber and not a shelf of law books that will find the solution. Intellectual snobbery has its part to play, and it was Winston Churchill who so aptly put it when he said that he went to the university of books for his education. In this century's pandemic a recognition of the importance of vocational training, and the realisation that attendance at university is not essential before being awarded a degree, are distinct positives.

Things equestrian can shine a light on such misguided presumptions. Probably, like myself, you have never had reason to consider that wild horses eat tough grass which will gradually wear down their teeth, whereas in captivity they are fed softer food and their teeth grow unchecked. Unless, however, the teeth are filed down (the process is called 'floating') they can grow too long and will cut the horse's cheeks. Floating must be done by hand and it is hard work because besides needing first to calm the animal, its mouth must then be held open while its teeth are vigorously filed.

Floaters, however, are not trained veterinarians, and in the American state of Texas the State Board of Veterinary Medical Examiners outlawed them, despite the fact that very experienced floaters are tantamount to skilled artisans. The State Board, however, determined that a floater was practising veterinary medicine without a license, attracting fines and possibly prison; the fact that veterinarians have no specialist training themselves in the field was considered immaterial. In the event, four seasoned Texan floaters filed suit – as opposed to teeth – in order to be able to continue earning a living, and they won their case. Different courses for different horses. Monopolies and vested interests

are not the sole domain of commerce, as I have observed. Guilds, in past centuries, were the forerunners of this phenomenon and they were just as zealously protective.

Fiduciaries, like floaters, to my mind practise a vocation if they meet the criteria: a thorough study of the law and administration of trusts with the ability to also exercise, through practical training and teaching, an adequate degree of measured judgement in order to serve the best interests of the trust or foundation beneficiaries. They need neither a bishop's nor a judge's robes and rather than being the King's conscience, they must be, at all times, the trust's conscience.

Just before leaving London in 1979, ahead of going to the Cayman Islands (a time when offshore really meant offshore), I purchased a copy of The Modern Law of Trusts (Fourth Edition) by David B. Parker and Anthony R. Mellows. In their introduction the authors said that "since the trust was invented, no lawyer has been able to give a comprehensive service to his client without a thorough grasp of the subject". But it follows that having a thorough grasp of trusts does not require you to be a lawyer, although it can provide you with a considerable insight into the general principles of law. Returning to consequences flowing from the pandemic, this realisation in the 21st century is but one of many entrenched, outmoded assumptions that are crumbling.

Despite the immense contribution made by Lord Nottingham, who has been called the father of equity (I would say that Seneca the Elder is a worthy contender), what becomes clear is how important moral principles are and although Plato wanted states ruled by philosopher kings, I argue that fiduciaries also require a generous dose of moral philosophy. No finer example can be found than the Roman Emperor Marcus Aurelius Antoninus. His Book of Meditations is truly timeless, as is the Complete Works of Michel de Montaigne. They may have both died at 59 years of age and lived centuries apart, but their individual philosophies remain as fresh as tomorrow's morning dew.

As a devotee of fountain pens and the written word, I find that simple language, like simple fiduciary structures, is also under siege; the capital of convolution, as far as language (and, by extension, legal documentation) must surely be the United States of America. George Orwell, wizard of the written word, would have been horrified. I remember reading about a county ordinance in Pennsylvania stipulating that strippers must cover one-third of their buttocks when they are dancing. The ordinance defined a posterior as being the "rear of the human body" and is "between two imaginary lines, one on

each side of the body (the 'outside lines'), which outside lines are perpendicular to the ground and to the horizontal lines described above and which perpendicular outside lines pass through the outermost point(s) at which each nate meets the other side of each leg." No wonder there is an organisation called Plain Language Association International. But don't despair: those needing a definition of a bare trustee rather than buttocks can contact me, and the answer won't require a knowledge of geometry.

Ralph Waldo Emerson said that life is a journey and not a destination. I say that knowledge is a destination and that the journey you have to make has many different pathways to choose from.