STRANGER ON THE SHORE:
THE TRUST IN PANAMA
(An address given to the Society of Trust and Estate Practitioners)

Let me firstly say that I am honoured to have been asked to speak to you today. Before addressing the subject of my talk, the doctrine of sham trusts, which for me is a black and white issue, I would like to qualify my comments by telling you that I studied Roman Dutch law as practised in South Africa and Rhodesia (which is now Zimbabwe) where it was imported from Europe by the first settlers but which then had elements of English law – particularly the trust – grafted on to the legal system as a result of forced English occupation before both countries became republics. The result is an interesting one: A civil code system in which the English trust is quite at home. We see something similar in Scotland where the jurisprudence is derived from Roman law but because of its proximity to England has brought about the development of a trust law similar – although not identical – to English trust law. Panama, like much of Latin America, never experienced the English influence at close hand and so kept its roots firmly in the civil code system. Some might say that it arrived as an unwelcome stranger.

Panama, however, did promulgate a trust law, namely, the Law on Trusts Number 9 of 1925, and which since then has been superseded. Unfortunately, despite such a passage of time there appears to be very little trust case law or precedents to guide a practitioner and this is particularly so regarding sham trusts. It would seem to me that Articles 12 and 15 of the subsequent trust law (Law number 1 of 1984) whilst having application in the case of fraudulent conveyance affecting creditors would find a plaintiff skating on thin ice if he placed reliance on either article in pursuing a sham trust claim. As to the question, should the doctrine of sham trusts apply in Panama, the answer is an emphatic yes. But whether or not the courts should support this view, I could only answer "perhaps".

I said earlier that for me the consideration of whether a trust is a sham or not is straight forward. Even although the 3 certainties of a trust may appear to be present: the words used are clear; there is a corpus and, thirdly, there are beneficiaries, it will be the settlor's actions and those of the trustee that will count – no matter how secret the settlor's intentions are kept. It all hinges on who will enjoy the trust benefits and most importantly, who will control the trust's operations. In order to be a sham both the settlor and the trustee must collude; the sham doctrine itself in English law is a general one that is capable of applying to all transactions and is not restricted to the creation of a trust.

A leading English case is that of Snook v West Riding Investments Ltd. in which the senior British judge, Lord Diplock stated: "I apprehend that, if it has any meaning in law, it means acts or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing I think is clear in legal principle, morality and the authorities… that for acts or

documents to be a “sham”, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.” A proper sham trust, please note, requires both the settlor and the trustee to conspire with one another.

Practitioners who are aware of their clients true intentions become accessories before the fact and do so at their own peril should subsequent events draw them into situations which can damage their reputation or worse. In such cases a bare trust and not a real trust has been created. Where a trustee is not privy to the sham but allows the settlor to have his way, that trustee is in breach of trust. As the judge in one case said: “the trustee should be in the saddle and firmly holding the reins; he should not be running after the horse desperately trying to mount it”.

Under common law here are some considerations that can lead to a trust becoming invalid and which are distinct from a sham argument being raised:

- The settlor retaining or acquiring a power to revoke the trust;
- The settlor retaining, possessing or acquiring the power of disposition over property of the trust;
- The settlor retaining, possessing or acquiring a power to amend the trust;
- The settlor retaining, possessing or acquiring any benefit, interest or property from the trust;
- The settlor retaining, possessing or acquiring the power to remove or appoint a trustee or protector;
- The settlor retaining, possessing or acquiring the power to direct a trustee or protector on any matter;
- Consideration as to whether the settlor is a beneficiary of the trust.

As I have said, where a sham trust exists, instead of a real trust a bare trust has been created and the contents of the trust deed are a fiction. There is no universal definition of a bare trust but the following explanation provided by the Inland Revenue in the United Kingdom, even although related to tax issues, is very helpful: “a bare trust exists where the beneficial owner of the property is fully entitled to both the capital and income from the property. The property will be held in the name of the trustee but the trustee will have no discretion over what income to pay the beneficiary. The trustee is in effect a nominee in whose name the property is held. The beneficial owner is the person who benefits from, and is entitled to, the property and the income it produces”.

One of the basic requirements of a bare trust, when one is intended to be created, is that the beneficiaries have vested (as opposed to conditional) interests in the trust property. It must be clear from the bare trust deed that no other person has, or can have, any vested interest in the trust property and that the trustee has no discretion as to the timing or distribution of the beneficiaries' shares of the trust property. In reality, the same applies in the case of a sham trust.

I have the same attitude towards fraudulent conveyance. The facts must speak for themselves: either the trust stands firmly upright or it has feet of clay. At this point, ladies and gentlemen, let me say that before you stands a trust traditionalist. Some might say a dinosaur. For this reason when I drafted section 61 of the 1991 Trust Ordinance of the Turks & Caicos Islands dealing with asset protection and fraudulent conveyance I did not include a period in which creditors claims could be lodged. The valid trust should not need government protection. Ironically, since its promulgation the only amendment to the Turks & Caicos trust law has indeed been to bring in a 3-year prescribed period which is also present in your foundation law.

If you will permit me I would like to end by taking the opportunity to include some other aspects of trusts.

I said a moment ago that I am a traditionalist and so I truly appreciate the existence of the Delaware Court of Chancery which was created in 1792 and has, sadly, outlived its source of inspiration, the High Court of Chancery of Great Britain. All of you are familiar with Delaware because of its association with your company law. Some of you mightn't know, however, that much of Delaware's fame as the leading corporate domicile in the United States rests on the application of fiduciary responsibilities derived from its strict adherence, unlike other US states, to that distinct English creature "equity" which heeds Seneca the Elder's belief that "certain laws have not been written but they are more fixed than all the written laws". Delaware has applied the two English concepts that, firstly, equity is a moral sense of fairness and, secondly, it is recognising that normal rules do not always apply fairly to abnormal cases. I appreciate the fact that the Court of Chancery in Delaware has never become trapped in a mire of procedural technicalities nor constraining legal doctrines. It is little wonder that it has become a leading trust jurisdiction for non-residents. But keeping things simple offshore has not been so easy. I think competition between offshore jurisdictions runs the risk of taking the trust concept beyond its basics such that its very essence is being eroded. Legislation with gimmicks, including names for categories of unique types of trusts come to mind.

One last word about trusts. The great British legal historian of the 19th century, Francis Maitland said: "If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely the development from century to century of the trust idea". Some of you will be thinking that trusts, in fact, pre-date any English concept of them. You will have the Roman Fideicommissum in mind. But I believe we're juggling oranges and apples. As I have explained in training sessions I have conducted, whilst it is true that both have the common element of

fiduciary responsibilities – which they share with foundations – their capacity and scope are vastly different. In the excellent publication, "El Fideicomiso en Panamá" the late eminent Panamanian jurist, Doctor Ricardo J. Alfaro, author of your first trust law, declared that the difference between the Roman Fideicommissum and the English trust is that while the Roman Institution is exclusively testamentary and can only deal with property transferred by inheritance, the trust may be an act inter vivos whereby all kinds of property may be transferred and which may be used in an infinite variety of business or civil operations" In other words, it was an extension of the will which, as we know, the Romans perfected and, incidentally, is the model which is used today in the United Kingdom and elsewhere. Unquestionably, Rome was home of the will upon which the foundations of trusts were built. I am indebted to my friend, Juan Tejada-Mora, who kindly gave me a copy of Dr. Alfaro's commentaries.

Like the ships that Panama welcomes to its shores from all over the world, it should embrace the differences between its own laws and those of other countries. Remembering the English saying that one man's meat is another man's poison let me leave you with an observation made by the US lawyer and political figure, Newton Minnow before the new Russia came into existence: "In Germany, under the law everything is prohibited except that which is permitted. In France, under the law everything is permitted except that which is prohibited. In the Soviet Union, everything is prohibited, including that which is permitted. And in Italy, under the law everything is permitted, especially that which is prohibited".

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