



**VACUUM CLEANERS,
FRYING PANS AND WATERGATE:
CHOOSING AN OFFSHORE TRUSTEE**

Offshore financial services are big business today and the attractions of large fees have taken inexperienced domestic providers offshore into uncharted waters. The use of offshore trusts has become very popular and today, like transatlantic travel, they are packaged and promoted internationally. Advertisements in leading financial magazines offer for sale offshore trust companies that are “legal, legitimate and affordable”. That tag can apply equally to firearms which, like trust companies, are potentially hazardous in the wrong hands. Amateurs managing trusts can be like children with matches in a fireworks factory, unable to perceive the dangers present. Critical errors can be made even before the administration of a trust begins. In some instances, corners are cut by cannibalising precedent trust deeds and a defective document is presented to the inexperienced client as perfect for his needs. Concealed defects in a deed can have a long incubation period and might not become apparent for some years, by which time the problems may well have been compounded.

Today, the world of trusteeships has become complex with the creation of elaborate strategies and exotic products fuelled, in part, by a plethora of competing offshore financial centres offering a legislative smorgasbord which seems to be in a constant evolutionary state. The United States in particular has fuelled the interest in offshore trusts where the increase in litigation, coupled with legal expenses and alarming jury awards, has become alarming. It was estimated sometime ago that 50,000 lawsuits are filed each week and over \$163 billion is paid in damages and lawyer’s fees in tort-related lawsuits. I can see no improvement – quite the opposite. But in seeking protection offshore, you do not want to go from the frying pan into the fire. You need the help of specialists and not salesmen. Many offshore trusts have boiler-plate deeds that do not necessarily provide for a particular individual’s special needs. They will, however, remain the soft option for the novice trustee who, more often than not, is also involved in the marketing of the product. Where the two functions are distinct from one another, then at least if a qualified and seasoned trustee is involved he can serve as a safety net by at least attempting to provide remedies or divert disasters resulting from zealous marketing. When professionals are replaced by salesmen who see trusts as the intellectual equivalents of vacuum cleaners, then a trust will remain fraught with danger for the client who has an inexperienced trustee flying along on auto-pilot until there’s smoke in the cabin.

Inevitably, the operational arm of the trust is an underlying company - perhaps even a related subsidiary trust or foundation - which manages a considerable portion of the trust assets under the stewardship of, where applicable, a board of directors, other trustees or a foundation council. But the amateur trustee will likely have a blind spot as to the extent of his fiduciary responsibilities in relation to those parts of the structure, however distinct, which have the trust at its centre. Speculative ventures by the directors, for example, which would not be countenanced



by the terms of the related trust deed are, nonetheless, tacitly sanctioned by the auto-pilot trustee. But that auto-pilot can be disengaged unexpectedly by, perhaps, a letter from a law firm following the death of the client, with an opening paragraph along the lines: "We represent the children of the abovenamed deceased who settled an offshore trust, of which you are trustee". Past passive attention to a company's affairs may now have a price-tag: a suit for breach of trust, perhaps.

The marketing and management of trusts has, in some cases, got completely out of hand. Some of those who are, rightly, only on the periphery of trust management have teamed up with the salesmen after recognising the profit potential and are prepared to take on fiduciary responsibilities as the price for gain. But just as you should weigh the virtues of an offshore jurisdiction against the level of regulatory competence it offers, so should you select the trustee in a jurisdiction by first judging his ability. It is, in my opinion, more important to choose the right trustee than it is the jurisdiction. After all, this is the age of electronic wizardry where - with qualification - the physical location of the trustee becomes more and more academic.

So, if you are confronted by a trustee who believes that a bare trust is associated with nudity, that an express trust is somehow quicker to manage than a normal one and that the legal definition of the three essential elements of a trust is a client, his cheque book and a pen, then I would suggest a hasty departure. The right trustee, as I said earlier, is more important than his location. Wherever you find it, competence is the key. I subscribe to the observation made by Ralph Waldo Emerson: "If a man write a better book, preach a better sermon, or make a better mouse-trap than his neighbour, 'though he build his house in the woods, the world will make a beaten path to his door". If you find yourself either on an arduous journey into Tibet or slashing your way through the Central American jungle, but sure of finding the right trustee, console yourself with the thought that it will be well worth it.

I also think that the choice of trustee should be made after a personal visit to a short-list of practitioners. The initial meetings themselves will normally send you positive or negative signals, although it is very important to see through the fog of pleasing personalities and smiles when trying to determine the quality of management. "What are your trustee qualifications and what is your experience?" These are the two most important questions to ask when choosing an offshore trustee because all other considerations or concerns should be secondary in importance. The

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Watergate moment, as I describe this interrogative approach, has been known to make some offshore trustees very uncomfortable when providing the answers.

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