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Minerva's Owl

Vieille Garde. The French term in English is "old guard", a description with very broad application. It was the name given to Napoleon's Imperial Guard which were the elite veteran regiments of his army. They made the last French charge at Waterloo. I consider myself to be part of a different kind of Old Guard, this time from the 20th century, and although no such grand antecedents apply, I am no stranger to the significance of Waterloo. My Waterloo is in the Caribbean and not Belgium; it is the name of the governor's residence on Grand Turk, capital of the Turks & Caicos Islands, undoubtedly so named to celebrate Britain's glorious victory. Both, however, have been places of conflict, if not battles.

At this point in time I liken myself to Minerva's owl that spread its wings as dusk fell and which Georg Hegel, the German idealist philosopher, mentions

in his 1820 work entitled Elements of The Philosophy of Right. Minerva, the Roman goddess of Wisdom, chose the owl as a symbol of sagacity. In describing philosophy as "the thought of the world. [which] does not appear until reality has completed its formative process...", Hegel argued that clarity, and therefore wisdom, comes only after an event has run its course; as with a setting sun so dusk follows and it is then that Minerva's nocturnal owl, after biding its time, finally spreads its wings and flies away. It is an unfortunate fact of life, however, that some will not wait for the setting sun.

The sun has not set on the question: when is onshore accurately classified as offshore? This question came up in the book Offshore Financial Centres and the Law: Suspect Wealth in British Overseas Territories, written by Dr. Dominic Thomas-James and which I reviewed at the request of IFC Media Ltd, in the UK. I suspect that for some

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the answer, as I wrote in my review, will take the Humpty Dumpty approach, as illustrated by Lewis Carroll's *Through the Looking-Glass*: "When I use a word, Humpty Dumpty said in rather a scornful tone," it means just what I choose it to mean – neither more nor less." We have already seen this proposition applied by governments and a miscellany of bureaucrats when defining a tax haven.

A large dollop of hypocrisy can be added to this semantic manipulation. A grand example of this can be found in the explosive exposé called "The Pandora Papers", which only confirmed what Thomas-James had written before the exposé came to light. The author points a finger at the United States and other developed nations. He concludes that South Dakota, along with several other US states, turn out to be "offshore havens" by virtue of meeting the standard criteria due to lax US laws. Both Dr. Thomas-James and I agree that those dwelling in glass houses are irresponsibly throwing stones. The Pandora disclosures only reinforce this.

Long gone are the days when offshore tax havens meant just that: islands surrounded by sea, just like offshore oil drilling rigs found in the Gulf of Mexico. This popular misconception is encouraged to this day by the Humpty Dumpty brigade. Consequently, we have the phenomenon described as "onshore offshore" locations, courtesy of the Pandora Papers. Lewis Carroll would understand this absurdity but I don't.

So, when is a jurisdiction a tax haven? It depends who is using the words. Regardless, getting down to brass tacks, whether you pronounce "tomato" differently in New York to how you do in London, the fruit still looks and tastes the same. Shakespeare in his play, *Romeo and Juliet*, enquired: "What is a name? That which we call a rose by any other name would smell as sweet". What was true centuries ago is still true today. To suggest that the words "offshore tax havens" can be strictly, and narrowly, defined is to follow the

example set by Lewis Carroll's rotund manifestation of pomposity.

Naked Emperors

Over the course of this year we have seen the European Union turn up the heat and launch an assault on those jurisdictions which it has identified as offshore tax havens, believing them to be centres of secrecy, with trusts usually being the prime suspect. No matter the temptation, I will not travel the well-worn path of highlighting the blatant display of ignorance on the EU's part; their basic understanding, for example, of how a trust functions drives one to distraction. If offshore trusts were not an invaluable tool in global wealth structuring my despair would not be so acute. As a result of this, offshore practitioners confronting due diligence requirements for trusts – not just, I should say, in Europe but elsewhere, and where a similar level of ignorance is often to be found – are faced with complex and conflicting rules seeking a clear path in cases where there isn't one, to a particular person's door in order to satisfy beneficial ownership criteria. If a square peg has to be bashed into a round hole, so be it as far as the EU is concerned.

I confess that I am a purist when it comes to trusts and I pose the question: how do you explain that the person who borrows your pen holds it in trust for you until he returns it? Possession of it bears no relationship to its ownership. This was an example given to me when I was a student of trust law. To take this further, no finer example will be found than bearer shares, once a useful tool in offshore planning and the scourge of regulators. Can you believe that a practitioner advised his client that he could safely declare non-ownership of bearer shares because they were held by him and not the client? The client, for tax purposes, did not disclose ownership of his bearer shares, ignoring who, in law, was the agent and who was the principal and his folly landed him in hot water.

Based on the confusion that trusts can cause, it begs the question: can we assume that those



charged with regulation know the fundamentals? If the one-eyed man is king in the kingdom of the blind, according to proverb, one can argue that partial sight is better than none; but when you are making up the rules others must follow, you need to have 20/20 vision, and if you don't, then defer to those who do.

If the problem with regulators was restricted to fiduciary principles it would be bad enough; sadly, it is not. I am reminded of the little boy in Hans Christian Anderson's folktale, *The Emperor's New Clothes*, who said that the emperor was naked, but who was ignored by the emperor for fear of him looking foolish. It has been my experience that often when technical advisers are referred to, they are not listened to.

How does it get to this? In an effort to find some answers - besides gaining invaluable experience and giving me a deep insight into how some governments really view (and understand) offshore financial services - I took up a financial services posting in the Caribbean with the British Foreign and Commonwealth Office in one of the Overseas Territories. I felt that the experience gained from being on the other side of the fence would pay off in the long run: well worth foregoing the alternative post which I had been offered in the Channel Islands by a Luxembourg-based financial services company. And so it proved to be, dealing not just with UK but international authorities as well. From this you may well understand why much of this commentary is tinged with cynicism. A clear insight can be gained from the book review link which has been sent along with the newsletter.

To be fair, I was able to appreciate the many hurdles brought about by too many cooks who certainly, on occasion, spoil the bureaucratic broth. My experience, I admit, evinced an ounce of sympathy for the British and local Turks and Caicos Islands' governments. But only an ounce. Despite the passage of time, I remain of the firm opinion that without change, there will continue to be this great divide between those who earn a

bureaucrat's living and those who are at the sharp end of business.

For those who consider my judgement harsh and peppered with private-sector bias, I turn to a writer who summarised things far better than me, the late W. Somerset Maugham: "There is no need for the writer to eat a whole sheep to be able to tell you what mutton tastes like. It is enough if he eats a cutlet. But he should do that." (*A Writer's Notebook*, 1995). I would like to think that while I may not have consumed a whole sheep during my career, I did at least consume somewhat more than a cutlet.

That's Life

Despite being, as I say, a member of the Old Guard, I am not one of those who is unwilling to accept change or new ideas, no matter how unsettling some of them may be. The ranks of old soldiers might be dwindling, but, there are some things that should not. You may recall that I wrote in September that the Casablanca rule meant that some fundamentals matter, just as a bicycle needs two wheels.

I fear that it might not be very obvious that some things are changing, while other's are in varying stages of decay. In his poem *The Passing of Arthur*, Lord Byron writes of "The old order changeth, yielding place to new"; but whatever changes are inevitable, clear communication remains essential, whether the reasoning comes from poets or politicians.

Readers will appreciate that the art of conversation is also on the endangered list. You can readily understand the frustration George Orwell must have felt when, in the early part of the last century, he bemoaned the progress of the radio, arguing that it would stifle conversation. I wonder what he would think today of cell phones and computers? They have become the main means of communication in the commercial and political world, especially for the young.

One hundred years ago this year, Percy Bysshe Shelley wrote his essay *A Defence of Poetry*, in



which he claimed that "poets are the unacknowledged legislators of the world!" Linda Colley in her book *The Gun, the Ship & the Pen* refers back to a time when the creation of constitutions was "as much a mode of literary and cultural creativity as writing a poem, a play, a newspaper article or, indeed, a novel". I will not comment further about the quality of some of today's newspapers. It was a time, however, when writing a constitution could still be seen as an art form, unlike today when they are mainly the product of government officials and lawyers, often (but not always) resulting in turgid prose.

Shelley was convinced that poetry had the power to persuade and inspire; it was when, of course, poetry played a prominent role in literature and it was fair to believe that the pen was mightier than the sword (a quote often attributed to Voltaire). Since then the sword has gone the way of the cavalry charge, and the pen is not mightier than the (computer) mouse. The keyboard, like so much else today, is much faster to use, but when words, and their use, are important, is speed a good thing? The Roman emperors believed in the adage

"festina lente", to hasten slowly, and it is wise advice that today's politicians, in particular, should heed.

Not surprisingly, I am a disciple of the pen. It is more laborious, yes, but this implement transmits signals directly from the fingers to the brain without any extraneous intervention from a computer. The slowness of the process, when compared with the rapidity of tapping fingers on a keyboard, allows pause for thought. This is why some authors still write their stories by hand because using a pen spurs cognitive engagement when summarising and organising one's thoughts. I am sure most young professionals find this a frightening statement, but as a member of the Old Guard my retort on such occasions is, *c'est la vie*, that's life. Perhaps Napoleon thought, or said, that at Waterloo. I know I did when I faced my own Waterloo. But that's another story.

In wishing all readers a safe and enjoyable festive season, as well as a fine new year, what I can say with certainty is that the sun is setting on 2021 and before darkness descends Minerva's owl will take wing.



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