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NEW LEGISLATION FOR ASSET PROTECTION TRUSTS

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Overview

In the last few years, no fewer than eight offshore jurisdictions have brought in legislation designed to limit the power of creditors to set aside transfers of assets into trust. These jurisdictions are the Bahamas, Belize, the Cayman Islands, the Cook Islands, Cyprus, Gibraltar, Mauritius and the Turks & Caicos Islands. All these jurisdictions have systems of law based, to some degree, on the English common law rules of equity, and the concept of the sham transaction is as much part of their law as it is of the Law of England.

The first in the field was the Cook Islands, whose International Trusts Amendment Act 1989 was enacted on 8th September 1989. Unfortunately, the draftsman - perhaps because of his haste to be first - required some second thoughts, and these were embodied in the International Trusts Amendment (No. 2) Act 1989 on 22nd December 1989 and the International Trusts Amendment Act 1991 on 19th December 1991. A rather differently drafted law in the Cayman Islands reached the statute book on 6th November 1989. This is the Fraudulent Dispositions Law

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1989. On 8th March 1990, the legislature of Gibraltar enacted the Bankruptcy (Amendment) Ordinance 1990, which was followed by the Bankruptcy (Amendment) (No. 2) Ordinance 1990 and the Regulations of 1st December 1990; these measures are couched in the form of an amendment to the Bankruptcy Ordinance (which is based on the English Act of 1914), but they serve essentially the same purpose - that of limiting the rights of creditors to set aside dispositions.

More recent enactments are those of the Bahamas, whose Fraudulent Dispositions Act of 1991 is modelled on the Cayman Law, but with some modification; the Turks & Caicos Islands, s.61 of whose Trust Ordinance 1990 deals with the whole matter in a few lines; Belize, the relevant parts of ss.7, 12 and 66 of whose Trusts Law 1992 has the effect of shutting out altogether claims which do not arise under the law of that country; Cyprus, whose International Trusts Law 1992 was enacted in Greek although drafted in English; and Mauritius, s.10(2)-(5) of whose Offshore Trusts Act 1992 provides for Asset Protection Trusts in that country.

The legislation of Belize, the Cook Islands, Cyprus, Gibraltar Mauritius and Turks & Caicos is in each case expressed in terms of transfers of assets into trust; that of the Bahamas and Cayman is capable of affecting transactions of various kinds, but including transfers into trust. Although these forms of enactment differ one from another, they proceed broadly upon the same principle - namely, that so long as the settlor was solvent (generally taking into account contingent liabilities) immediately after he had parted with the assets transferred, the transfer cannot be impugned. It is no doubt theoretically possible for a law to deprive even existing creditors of their rights, but the jurisdictions concerned evidently considered that if their legislation leaned too far in the direction of protecting beneficiaries against creditors, they would attract an undesirable kind of business. In the event, they have all given weight both to the claims of creditors and to the claims of beneficiaries, though the way in which these opposing claims have been balanced differs somewhat from one jurisdiction to the other.

There are other differences between them, but it is nevertheless possible to make some general observations about them all.

First, nothing in this legislation deprives a plaintiff of any remedy he may have on the grounds that the trust was established by duress, mistake, undue influence or misrepresentation (though this is spelled out only in the Belize Law), or any remedy he may have in conversion, where the settlor has purported to settle assets which are not his, or by way of an action in conspiracy, where the plaintiff can show that the defendants took steps together to harm him by way of his trade or calling.[2] This last category is of particular importance for defendants to such an

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[2] See *Lonrho v Fayed* [1991] 3 WLR 188.

action may be the settlor and the trustee and may include solicitors, accountants and others involved in the transaction in question, and such litigation does not necessarily require to be commenced in the far-away places where the trusts and companies have been established, but may take place in the courts where the defendants reside.

It should also be borne in mind that by dint of the fact that a trustee in bankruptcy succeeds to all a bankrupt's property rights such rights include the rights to the bankrupt's books and papers and books and papers held by agents of the bankrupt including those subject to legal professional privilege since the trustee in bankruptcy as successor in title can assert the privilege of the bankrupt. A trustee in bankruptcy could therefore gain access to papers to enable him to unravel as to how and in what circumstances the bankrupt divested himself of his property and those who were involved in and advised upon the scheme of action[3]. Furthermore, if in any action for fraud a prima facie case can be made out that a defendant has been involved in any fraudulent action then documents discoverable against him will include those which would ordinarily be confidential as subject to legal professional privilege[4].

Secondly, this legislation (apart from that of Cook Islands and Belize) does nothing to limit the rights of a successful plaintiff to enforce in the jurisdictions concerned an order obtained in a court elsewhere.

Thirdly, it may be questioned whether any of these laws (except that of Belize and the Cook Islands) override the rule that no one can reserve property to himself until bankrupt and provide for it then to pass to someone other than his creditors.

And lastly, it may be noted that most of the jurisdictions with which we are here concerned have the Privy Council in London as their final court of appeal. The authors have, of course, no means of knowing what matters if any will come before that tribunal, but they think it would be reasonable to predict that at any rate the more extreme of these laws would not be looked upon with favour by members of the Privy Council and that the construction they are likely to put on the provisions would not favour the trust which appeared to have the effect of robbing a deserving creditor of what would otherwise be his remedies.

Trust instruments commonly provide for (and statutes sometimes expressly sanction) a change in the law governing the trust, and the power to make such change is often vested in the trustees. While an Asset Protection Trust is generally

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[3] See ss.283, 311 and 436 of the Insolvency Act 1986 and *Re Konigsberg* [1989] 1 WLR 1257.

[4] See *Williams v Quebrada Ry* [1985] 2 Ch 751 and *R v Cox* 14 QBD 153.

thought of as one governed from the beginning by the law of a jurisdiction referred to in this article, trustees of trusts governed by other laws may wish to consider the possibility of changing the governing law to that of one of these jurisdictions. Most of these enactments restrict their effect to dispositions made after they respectively came into force; but the Cook Islands Act and the Turks & Caicos Ordinance import no such restriction.