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"SHAPING THE GLOBAL AGENDA OF THE OFFSHORE WORLD"

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KEYNOTE ADDRESS

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BALANCING THE REQUIREMENTS OF
THE TRUST WITH FAIRNESS AND PROBITY
- A perspective from the Cayman Islands Courts

1. The past thirty years or so have borne witness to remarkable developments in the financial industry in International Financial Centers like the Cayman Islands. As individuals and corporations become ever more internationally mobile in the Global Economy, their wealth and succession planning requirements become more complex and sophisticated; and so too do the structures and products which are crafted to meet their needs.

2. As everyone in this audience will appreciate, intentions of settlors (or grantors) of trusts will often be underpinned by many concerns and demands: they may be concerned about the maintenance of confidentiality; including as that might relate to concerns for their and their families' personal security. They may be motivated by a desire to make charitable and philanthropic donations. Often they are driven by forced heirship concerns arising in their home jurisdictions, or the wish to ensure that, whatever shape their plans may take, they are consistent with their religious beliefs or spiritual persuasions. They will also, of course, be concerned with asset protection and growth, for instance where this can be enhanced by legitimate tax planning.

3. While participants in the offshore financial industry understand the need for innovation and flexibility to meet such legitimate and diverse objectives of clients, others regard the offshore practices and legislative agendas with

suspicion. These detractors have argued, that in their drive to maintain flexibility and utility of the offshore trusts, some jurisdictions are obstructing the more developed countries in their quest to increase and protect their tax revenue sources and this is often coupled with the further argument that offshore centers pose a threat to the less developed countries, because they give refuge to corrupt officials who seek to hide the proceeds of corruption.

4. While it is not the main aim of this paper to rebut such arguments, they may fairly be criticized as being, at best, uninformed. At worst, as seeking to deflect scrutiny from the fact that it is far more commonplace that such abuses occur in the onshore jurisdictions, where anti-money laundering regulation is lax when compared to the regimes of several offshore centres including the Cayman Islands. In this regard I do not merely offer my own subjective point of view as an "offshore" judge. Compelling expositions on the subject are available from others perhaps better placed to comment. See for instance, Richard Hay's recent article: "*The G8 Transparency Drive: Triumph or Own Goal*"[1]; and Professor Jason Sharman's study prepared for the Commonwealth Secretariat: *"International Financial Centres and Developing Countries: Providing instructions for growth and poverty alleviation"*[2].

[1] Tax Notes International), May 27, 2013 p.825

[2] And as Raymond Baker, author of "Capitalisms Achilles Heel" puts it: For every $1 that we have been generously handing out across the top of the table we in the West have been taking back some $10 of illicit money under the table. There is no way of making this formula work for anyone, poor or rich! And as Prof. Jeffrey Sachs of Columbia University is reported (variously and contradictorily) to have said:

5. But despite these realities, amidst the fall out from the 2008 financial crisis, a consensus has emerged within the G8 that there must be a shift in perspective, both in the way that offshore jurisdictions promote their efforts to strengthen regulation and fiscal transparency, as well as a change in the expectations of those who wish to do business offshore.

6. Indeed, nearly contemporaneous with our meeting here today, we are aware of the G8 Summit in Northern Ireland from which it is reported that the UK has pressed for a multi-lateral regime similar to that embodied in the U.S. Foreign Account Tax Compliance Act ("FATCA"). The ultimate aim will be the creation of central registries for corporate ownership and cross-border enforcement of tax collection, and sharing of information on income and dividends. As Richard Hay comments in his article just mentioned, if the system delivers as intended, the G8 countries will receive a global snapshot of their citizen's annual income and net worth, wherever their assets may be located. This remarkable initiative must be understood for what it really would be – contrary to the centuries old principle of public international law that no nation is obliged to enforce the tax regime of another nation within its own

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(a) "*It does not surprise anyone when I tell them that the most important tax haven in the world is an Island. They are surprised however, when I tell them that the name of the island is Manhattan. Moreover, the second most important tax haven in the world is located on an island. It is a city called London in the United Kingdom*."

(b) "The United States is itself increasingly a haven for foreign investors, especially in Delaware."

(c) But "the only real purpose for these havens is to facilitate tax evasion, money laundering, bribery, and lack of accountability…. Ending the tax havens and their financial secrecy is therefore urgent" (www.huffingtonpost.com/jeffery-sachs/time-to-end-the-tax-haven, May 8th 2013 and see "*Havens in a Storm*" by Jason Sharman, page 105 F.N. 16. Cornell University Press , 2006.

territory[3]; will seek to impose precisely that obligation, and to do so ultimately by the threat of imposition of sanction for non-compliance.

7. The Cayman Islands, ever adhering to the belief that it is better to lead than to follow, has agreed with the UK Government to subscribe to a pilot programme for this initiative. The pilot will be patterned on the model agreements negotiated by the United States with five countries so far, aimed at compliance with FATCA.

8. Many within the Cayman Islands and within the international financial community are waiting to see whether the initiative will respect the legality of the trust concept and the fact that when properly constituted, a trust is entitled to hold assets in its own right, free from any confusion of identity with its settlor.

9. No doubt, in whatever way these G8 initiatives might develop, the utility of the trust will be central to the debate, and any discussion of these ideas must I think, begin with recognition of the fact that the concept of the trust is both well established and at the same time inherently malleable. Its ability to adapt to changing social and economic circumstances without altering its

[3] Authoritatively explained in Government of India v Taylor [1955] AC 491. There Viscount Simonds (referring to the 18th contrary dictum of Lord Mansfield from cases such as Planche v Fletcher (1779) 1 Doug 251, 253, Holman v Johnson (1775) 1 Cowp 341, 343) regarded the principle as being axiomatic and settled when he said: "*My Lords, I will admit that I was greatly surprised to hear it suggested that the courts of this country would and should entertain a suit by a foreign nation to recover a tax …*"

"irreducible core"[4], is central to the notion of what a trust has been from inception[5].

10. The basic concept of the trust, based on the duties of fidelity and good faith, has proliferated and diversified over hundreds of years, so that we encounter it today in wills, legitimate tax and succession planning, the vesting and holding of property and pensions, as well as in an extraordinarily wide range of commercial transactions. We have even come now-a-days to hear of the "blind trust", a uniquely North American construct of some political relevance, where a person in public life is said legitimately to perceive the need for protection from concerns about conflicts of interests[6].

11. Indeed, so malleable is the fiduciary nature of the trustee's obligations for safeguarding the interests of investors or beneficiaries, that John H Langbein, professor of law and legal history at Yale, in his paper "*The Secret Life of the Trust*", estimated in 1977 that:

> "*most of the wealth that is held in trust in the United States is placed there incident to business deals, and not in connection with gratuitous transfers ...well over 90% of the money held in*

[4] Armitage v Nurse [1988] Ch 241, as applied in the Cayman Islands in Lemos v Coutts [2003] CILR 281 at 403 and in subsequent cases. See also D.J. Hayton (as he then was) "*The Irreducible Core Content of Trusteeship*" in T. Oakley (ed.), Trends in Contemporary Trust Law, Oxford Clarendon Press 1996.

[5] An insightful survey of the development of the trust concept in modern Caribbean legislation is provided by Justice David Hayton of the Caribbean Court of Justice in a recent paper given at the University of Lichtenstein: "The strength of beneficiaries' rights under English law and the laws of Caribbean States." Despite the innovativeness of some regional statutes seeking to block the rights of beneficiaries to apply to the court in its supervisory jurisdiction to compel disclosure of trust information or to hold trustees or protectors accountable, Justice Hayton concludes, by having regard to regional case law, that the Courts have held that such attempts to oust the jurisdiction of the courts are invalid.

[6] See definition of the "Blind Trust" given in "Commonwealth of the Caribbean Trust Law", Kodilinye and Carmichael 2nd Ed. Pp225-226; Cavendish Publishing 2007.

trust in the United States is in commercial trusts, as opposed to personal trusts."[7]

12. Blessed with relative political and economic stability over the last 50 or so years, the British Overseas Territories, sharing as they do an English legal heritage, have played their own part in ensuring that the trust concept keeps pace with the demands of an increasingly sophisticated and diverse commercial world. In the Cayman Islands in the late 1980s and throughout the 1990s, we saw among other developments for example, the introduction of reserved powers legislation[8], the presumption of immediate and lifetime effect[9], and the statutory validation of non-charitable purpose trusts[10] commonly known as STAR trusts.

13. In 1989 the Cayman Islands Fraudulent Dispositions Law replaced the English Statute of Elizabeth, creating a regime for balancing creditors' rights with legitimate asset-protection objectives.

14. And central to this is the affirmation of the principle that every disposition of property made with an intent to defraud and at an undervalue, shall be voidable within six years of the disposition, at the instance of a creditor prejudiced by it. Under the Bankruptcy Law (1997 Revision), if the settlor of a trust commits an "act of bankruptcy" (as per s14 of the Bankruptcy Law) within the Cayman

[7] 'The Secret Life of the Trust: The Trust as an Instrument of Commerce", Yale Law Journal, Vol 107, page 165, 1907-1998.
[8] S14 Trusts Law (2011 Revision) introduced in 1998 with the Trusts Law (1998 Revision).
[9] S13(1) Trusts Law (2011 Revision) introduced in 1998 in the Trusts Law (1998 Revision).
[10] Part VII of the Trusts law (2011 Revision), introduced in 1977 by the Special Trusts (alternative Regime) Law 1997.

Islands, he may be made bankrupt within six months of the act and transactions at an undervalue can be set aside by the trustee in bankruptcy, if they occurred within a prior period of up to 10 years.

15. The foreign elements provisions of Cayman's Trusts Law, known as its "firewall" legislation, is an innovation which has since its introduction in 1989 found its way into the statute books of other offshore jurisdictions. It provides that, in essence, foreign law or a foreign judgment shall not be recognised, enforced or give rise to an estoppel, insofar as it is inconsistent with other provisions of the Cayman Trusts Law (20 11 Revision). This in effect ensures that Cayman Islands law shall govern trusts which are domiciled there; all part of the comprehensive public policy that repudiates any presumption of irregularity behind Cayman Trusts[11].

16. And this is, of course, a policy that does nothing more than preserves the ancient respectability of the Trust concept.

17. To quote Frederic William Maitland, the English jurist and legal historian:

> "*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 shall have any better*

[11] These provisions also give effect in local legislation to the provisions of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and in their Recognition where by Article 6 it is provided that a trust shall be governed by the law chosen by the settlor. See ***Megerisi v Protec Trust Management*** (below) for a consideration of the incorporation of the Hague Trusts Convention into Cayman Trusts Law.

answer to give than this, namely the development from century to century of the trust idea."[12]

18. It is fair to say, however, that while the international financial centres have led the way in the evolution of modern trust law in the last 20 or 30 years, some commentators have expressed a concern that they are in danger of leaving too far behind the core concept of the trust as it is recognised in English law, in the drive to attract new business and meet the demands of clients. This debate which has been over the movement away from the beneficiary principle and the "irreducible core", to the introduction of STAR and the non-charitable purpose trusts; has proven to be as fierce as it is fascinating.[13]

19. But, at the end of the debate what matters most I think is certainty. And certainty in the application of legal principle and confidence in the infrastructure of the court system in the Cayman Islands, are key to the continuing success of the jurisdiction. In the same way that confidence in legislative developments such as the STAR trust, is strengthened by mature debate and careful deliberation; the credibility, durability and strength of the trust concept is further supported by its frequent examination and the application by the Cayman Islands Courts, of the principles of equity and of precedent-based case law. And it would be remiss of me not to acknowledge

[12] Collected Papers: The Collected papers of Frederic William Maitland, Ed. Fisher, Cambridge, 1977, 3 vols, at 271.
[13] See for instance: Tax Justice Network, "*In Trusts we trust*"; Wednesday July 22, 2009 and Oxford Journals Vol. 19 Issue 2, Trusts and Trustees; Star Trusts, Antony Duckworth.

that the same holds true for the rigorous approach taken by our colleagues of the Courts in the other Overseas Territories.

20. This judicial rigour is exemplified most frequently in the Grand Court's inherent jurisdiction to supervise the administration of trusts in the Islands. As the supervisory jurisdiction was explained by Lord Walker of Gestingthorpe in the Privy Council case of ***Vadim Schmidt v Rosewood Trust***[14], referring to a beneficiary's right to disclosure of trust information:

> *"The more principled and correct approach is to regard the right to seek disclosure of documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere) power, may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection and the nature of the protection he may expect to obtain, will depend on the Court's discretion."*

21. In furtherance of that supervisory and discretionary jurisdiction, trustees, beneficiaries, executors, administrators and enforcers alike, have a right to apply to the Grand Court of the Cayman Islands for the determination of a

[14] [2003] UKPC 26

question arising in the administration of an estate or in the execution of a trust.[15]

22. Trustees are also entitled to apply to the court under section 48 of the Trusts Law (2011 Revision) for an opinion, advice or direction, on any question relating to the management or administration of trust assets, such application to be served on all parties with an interest in it. As I described this jurisdiction in my judgment in ***A v Rothschild Trust Cayman Limited***[16]:

> "*it is a jurisdiction to which resort has been taken in a number of different circumstances and while its boundaries have never been defined by the court, it has, from the decided cases, clearly come to be regarded as a remedial jurisdiction, for orders to be made as the justice of the case deserves."*

23. The development of this statutory jurisdiction has of course been influenced by the case authorities, not least those which derived from the so-called "rule in ***Hastings-Bass"***[17] as well as those cases dealing with the grant of relief by way of rectification for mistake.[18]

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[15] Grand Court Rules Order 85
[16] [2004-05] CILR 485, at 497

[17] ***In re Hastings-Bass, deceased*** [***1995]*** Ch. 25.
[18] See respectively, (for instances) ***A and Six Others v Rothschild Trust Cayman Limited*** (above); ***In Re Q Trusts 2001 CILR 481***; ***In re Ta-Ming Wong Trust 2010 (1) CILR 541*** (and as to rectification): ***In Re Bridge Trust 2001 CILR 132; Megerisi v Scotiabank Trust (Cayman) Ltd. 2004-05 CILR 456***; and ***Megerisi v Protec Trust Management and Others***, ***FSD Cause 79 of 2012 (ASCJ), Grand Court, Cayman Islands; written judgment 18th December 2012.***

24. But the applicability of the rule in ***Hastings-Bass*** must now be reconsidered in light of the UK Supreme Court decision in ***Futter and Pitt***.[19] There the ***Hastings-Bass*** rule has been recognised as having a narrower ambit than it had been ascribed in the earlier cases, many of which were decided in the offshore jurisdictions. It is now clear that under English law, the proper application of the rule requires that a fiduciary must be shown to have acted in breach of fiduciary duty by having failed to take account of a relevant and important factor, before the Court will intervene to grant assistance. Where there is no such breach of duty, a fiduciary may not seek the court's intervention to set aside the decision, merely on the basis that the advice upon which he based his decision was wrong.

25. But against the background, where relief had been granted by the courts in many cases, by having regard to a misunderstanding as to the tax consequences of a transaction rather than as to its effect; ***Futter and Pitt***, while of binding effect in England and likely to be regarded as highly persuasive in the offshore jurisdictions, nonetheless excites debate in the offshore jurisdictions. The natural question arises: why should a fiduciary who fails to take proper advice, and fails to take important matters into account and so acts in breach of duty, be able to get relief from the courts but a trustee who acts prudently by taking advice which turns out to be wrong, should not? While the rule in ***Hastings-***

[19] ***Futter(and another) and Pitt (and another) (Appellants) v The Commissioner for Her Majesty's Revenue and Customs [2013] UKSC 26.***

Bass will itself no longer be a basis for granting relief in the latter circumstances, I understand that there is in Jersey, already consideration being given to the adoption of legislation to confirm the jurisdiction as it was thought to exist.[20]

26. Given the wide ambit of section 48 of the Cayman Islands Trusts Law, the wider jurisdiction may be regarded as continuing to exist there. It would be one nonetheless to be very carefully applied and developed in light of Lord Walker's salutary advice given also in ***Futter v Pitt***; (at para. 66-67) that if trustees can too readily claim relief on the basis of having taken incorrect advice (or on the basis of having blindly followed a settlor's wishes) the decision-making process which is fundamental to the fiduciary relationship, would be open to serious question.

27. With all such jurisprudential concerns properly borne in mind, it will nonetheless emerge that the public policy considerations will continue to be different in the offshore jurisdictions, than in the onshore jurisdictions.

28. Disputes and questions arising in the administration of the trust in the offshore world, can arise from the circumstances of families and assets based almost anywhere in the world. They can involve highly complex and sensitive issues,

[20] In Jersey consideration is being given to amending the Trusts (Jersey) Law 1984 so as to include a statutory version of the rule as it existed prior to ***Futter and Pitt.*** See *Appleby eAlert*, www.applebyglobal.com, May 2013.

I might add that the Supreme Court's clarification also in its judgment, of the equitable doctrine of mistake could mean that the remedy of rescission or rectification for mistake may be more accessible than before.

as well as significant sums of money and their effective disposal will involve careful and proactive case management.

29. This approach to trust litigation in the Cayman Islands, recognises that all stakeholders need to have confidence that their disputes will be handled professionally, efficiently and cost effectively by the courts, its attorneys and the other professionals who practice there. Certainty in the application of the law towards a predictable outcome is of primary importance. Despite the obvious strength and durability of the trust concept, to ignore the demands and complexities of trust disputes, which inevitably arise would be naïve. It is also recognised however, that even as we in the offshore world are going about the daily affirmation of the modern trust, it would be naive to ignore the more reasonable voices of scepticism.

30. It is worthy of note that judicial scepticism onshore about offshore structures, has found its expression in a number of different forms. As Mr. Justice Coleridge in the English Family Division put it in 2004, while adjudicating a financial application on divorce:

> *"Sophisticated offshore structures were very familiar to the judiciary trying ancillary relief proceedings and did not impress, intimidate or fool anyone. If clients used such structures to avoid disclosing their true wealth they could not expect sympathy when*

it came to the question of paying the costs of the enquiry which inevitably followed."[21]

31. In the case of ***Charman v Charman*** the English Court of Appeal in 2007, referred to the "*judicious mixture of worldly realism and of respect for the legal effects of trusts, the legal duties of trustees and in the case of offshore trusts, the jurisdictions of the offshore courts*",[22] while at the same time, emphatically confirming that the assets in a Bermudian trust should be treated as available "financial resources" for the exercise of the division of assets on divorce[23].

32. Several examples of scepticism can be found in the courts of the United States, most often in claims brought by the IRS or by regulators, or in bankruptcy

[21] J v V [2004] 1 FLR 1042
[22] [2007] EWCA Civ 503
[23] Pursuant to the Matrimonial Causes Act 1973 S.25(2)(a) the court found that the trust assets should be regarded as financial resources available to the husband because in the changed circumstances of his need to discharge obligations to his ex-wife following divorce, the trustees would advance capital to him to allow him to discharge those obligations. This was despite the husband's contention that he had established the trust as a "dynastic" trust because, among other reasons, the evidence in the case (including his Letters of Wishes to the trustees) did not support that contention.

The very recent decision of the British Supreme Court in ***Petrodel v Prest*** ***[2013] UKSC 34 (12 June 2013)***further illustrates how the courts will recognise the realities of beneficial ownership of assets which should be treated as available financial resources upon divorce without the need to pierce the corporate veil of companies which own them legally. Nor does Cayman's "firewall" legislation invariably provide immunity to trusts from foreign orders which seek to enforce a fair division of financial assets upon divorce. While section 91 (b) of the Trusts Law declares that no trust governed by the laws of the Islands shall be liable to be set aside on the basis that it defeats rights, claims or interests conferred by foreign law upon any person by reason of a personal relationship to the settlor (eg: by marriage), section 90 provides that the Law does to validate any disposition of property which is neither owned by the settlor nor deemed not to be owned by him as a matter of determination under foreign law where the settlor may be domiciled. Where no such issue of ownership arises, it would however appear that the section 91 provisions would provide protection to trust assets..

The approach of the English Courts to the specific question whether a petitioner's application to vary a foreign trust said to contain matrimonial assets should be determined by reference to the divorce law of England and Wales and not by reference to the Recognitions of Trust Act 1987 (which gives effect to the Hague Trusts Convention) is set out in ***Charalambous v Charalambous*** ***[2004] EWCA Civ. 1030.***

proceedings, and the individuals involved there have not always escaped prison for contempt.[24]

33. Such cases are of course examples of what pre-eminent Harvard Professor of Law, Austin Wakeman Scott, in his authoritative treatise on trusts law, describes as the "*darker side of the picture. [Where] The trust has often served as a means of evading the law ....*" He went on to say: "*It has often been said that a trust is altogether the same that a use was ...they have the same parents, fraud and fear; and the same nurse, a court of conscience.*"[25]

34. The "darker side" has, regrettably, in the eyes of the G8 officialdom, come to dominate the way in which offshore trusts are perceived and described. The US Senate's investigations produced almost 400 pages in its report entitled "*Tax Haven Abuses: The Enablers, The Tools and Secrecy*", in conjunction with hearings held on 1 August 2006.

35. Senator Carl Levin, the author of the report, was quoted in the New York Times as saying the law "*should assume that any transaction in a tax haven is a sham*". The report itself concluded broadly that:

[24] In ***Federal Trade Commission v Affordable Media LLC*, *179 F 3d 1228 (9th Circuit Court of Appeals 1999)*** Denyse and Michael Anderson were co-trustees and protectors of a Cook Islands trust held with a Cook Islands trust company, Asia Citi Trust Limited. They were committed for contempt by the US District Court after they claimed they could not repatriate assets back to the US, although they were deemed to control them either directly or indirectly. They were ostensibly removed as trustees by Asia Citi who then refused to co-operate on the basis that their directions given to Asia Citi to repatriate the assets to the United States were given under orders. Asia Citi then refused to co-operate but the Andersons remained protectors of the trust. The finding of contempt was made in the context of fraud alleged by the US Federal Trade Commission, in relation to a telemarketing scheme. The court held, unsurprisingly, that the impossibility of complying with the repatriation order was "self-created".

[25] Austin W Scott & William F Fratcher, The Law of Trusts.

"(a) Offshore service providers in tax havens use trustees, directors and officers, who comply with client directions when managing offshore trusts or shell corporations established by those clients and do not act independently;

(b) Financial secrecy laws and practices in offshore tax havens make it easy to obscure the economic realities underlying a great number of transactions, with unfair results under US tax and securities laws."

36. At the G20 Summit in 2009, the then President of France, Nicolas Sarkozy put it bluntly- "*We want to put a stop to tax havens*".

37. Although the bipartisan bill entitled "Stop Tax Haven Abuse Act" has not passed into law in the United States and has only been recently reintroduced to Congress in April this year, Senator Levin, its promoter, has continued his campaign for greater transparency in financial transactions which have their root in offshore jurisdictions. In a statement to Congress on 18 July last year, Senator Levin reaffirmed his support for the proposed Act", stating:

> "*There is indeed no free lunch here. In 2006 our Subcommittee on Investigations estimated that the tax havens cost the Treasury in the neighbourhood of $100 billion a year, and though we have had some successes in the battle against tax havens since then,*

tax dodgers and tax avoiders have continued to exploit every offshore loophole and tax haven they can find"[26]

38. In the same statement by Senator Levin, he went on to demonstrate what has become an increasingly common tendency, to unite the international anti-money-laundering and anti-terrorism efforts, with what he refers to as "resisting tax haven abuses". Earlier last year, the House of Representatives deleted a provision of the CUT Loopholes Act[27] after it had been passed by the Senate which, according to Senator Levin, "*would have given the Justice Department the same tools to combat tax haven abuses that they now have to combat money laundering*."

39. The OECD has also thrown its weight behind transparency and exchange of information for fiscal purposes, establishing a Global Forum (of which the Cayman Islands is again proactively, a member), tasked with ensuring the implementation of an international standard in tax information exchange and co-operation. Since its establishment in 2009, Tax Information Exchange Agreements between nations have proliferated and phase two of the peer reviews undertaken by the Global Forum is underway.

40. This is the current context in which the judiciary of the Cayman Islands –as part of their inherent supervisory jurisdiction over the administration of trusts domiciled there – must achieve what has been described by one local

[26] From a press release reproduced on Senator Levin's website at www.levin.senate.gov/newsroom
[27] Described as the "Special Measures" provisions.

commentator as a "*fine balance*"[28]. A fine balance between, on the one hand, individuals who may wish to protect their assets legitimately or who may seek to minimize their tax bills in compliance with their local tax laws, and on the other; creditors, including government revenue agencies, who wish to recover debts or revenues owed to them and, of course, the obligation to co-operate in the fight against international crime.

41. This current context in which we operate also has implications for the further development of the law of private client confidentiality. The concept of confidentiality, of course, had its genesis in English law. In a paper I wrote and which was published in the Jersey and Guernsey Law Review in February last year, I described it in this way:

> "*Duties of confidentiality, as part and parcel of the duties of loyalty and good faith, are necessary incidents of a fiduciary relationship, a relationship established by duties which come from the wellspring of equity,· from the obligations, policed by the courts of equity, to hold identified property for the benefit of others. These obligations, forming part of the moral code which governs fiduciaries, are the hallmarks of personal relationships of "trust and confidence", underpinned by the solemn obligation of the professional and entrusted person to*

[28] Sara Collins, 'A fine Balance', Cayman Financial Review, August 2007

respect the privacy of those whose interests he must protect. This is an idea with deep roots in the common law of both England and the United States of America.[29]

42. This is another example of the "balancing exercise" which the court has to undertake in the exercise of its supervisory discretion. Again I refer to ***Schmidt v Rosewood*** where the Privy Council described the exercise in this way:

> "*Especially where there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary ...may have to be an important part of the balancing exercise which the court has to perform on the materials before it."*

43. I should not continue my discussion of the duty of confidentiality in the trust context, without mention of the Cayman Islands Confidential Relationships (Preservation) Law ("the CR(P)L"), most recently revised in 2009 and the proposed Data Protection Bill 2012[30], currently going through the process of public consultation in Cayman. The Data Protection Bill has been drafted with

[29] 'A New World of Trust Litigation: A Cayman Perspective', Jersey & Guernsey Law Review, February 2012.

[30] Available from the Law Reform Commission website and by link with wwwcaymanjudical.legalinfo.com.ky

the aim of achieving European Commission recognition of the Cayman Islands data protection regime, while balancing the expectations of personal privacy with the new international standards on financial transparency.

44. But even before the introduction of a data protection statute, the established case law of the Cayman Islands, belied the myth of absolute secrecy or confidentiality. While the CR(P)L has at its heart the principle of the maintenance of confidentiality of a principal's financial affairs, the statute also makes provision for numerous exceptions, consistent with the Islands' legal, moral and international obligations.

45. These relate to:

(a) the investigation of criminal offences whether in Cayman or abroad;

(b) regulatory matters through the auspices of the Cayman Islands Monetary Authority, the Financial Secretary or the Governor;

(c) the vindication of rights in civil court proceedings whether taken in the Islands or abroad; and

(d) Information provided under a request, made through the Tax Information Authority established under the Law passed in 2009, specifically to enable the implementation of the Islands' Tax Information Exchange Agreements.

46. The treatment by the Cayman Island courts of applications for disclosure has been consistent over many decades and illustrates the manner in which the

jurisprudential "*balancing exercise*" has been undertaken. It is plain, however, that there is ample scope for conflict of laws issues to arise in the future, as they have occasionally in the past, particularly in view of the stated intention of regulators outside the Cayman Islands to assert their jurisdiction over disputes relating to, amongst other structures, Cayman Islands trusts.

47. A stark example arose in the case of ***Re H***[31]. There a trustee of a Cayman Islands discretionary trust, long settled by the settlor for the benefit of his family, was the subject of a Pennsylvania Grand Jury subpoena. The trustee's father, the settlor of the trust, was subject to the Grand Jury investigation in Pennsylvania, due to alleged breaches of the Bankruptcy Code there. The trustee was subpoenaed by the Grand Jury to give evidence about the nature, location and extent of the trust assets. A challenge brought in the Cayman Islands to the validity of the trust by the Pennsylvania court appointed trustee-in-bankruptcy was, at that time, subject to separate proceedings in the Cayman court and, although the settlor did not object to disclosure, the trust companies in the structure did not consent. At the heart of the Pennsylvania Grand Jury investigation was the presumption that the settlor remained owner of the trust assets, despite them having been settled on trust long before his bankruptcy.

48. In the judgment, I held:

[31] [1996] CILR 37

"*If validly constituted, the trust must be regarded as holding property independently of its settlor. The pivotal issue of validity remains to be decided ...as a matter of Cayman (Islands) law which governs the trust. While that pivotal issue remains to be decided ...it would be contrary to public policy and an unwarranted negation of the applicant's duty of confidentiality owed as trustee, to direct that he should give into evidence, confidential information in foreign criminal proceedings which, as a matter of Cayman (Islands law, may yet come to be regarded as misconceived.*"

49. Directions for disclosure were therefore refused. The investigation and subsequent action in the Pennsylvania courts against the assets of the Cayman Islands trust were eventually discontinued.

50. In ***Re Ansbacher (Cayman) Limited***[32] 2001, the following was said by way of explaining the balancing exercise:

"While the confidential information about the affairs of persons doing business in and from the Islands is required to be protected, the protection afforded by the law is not absolute. Disclosure will be allowed where it is appropriate to ensure that justice is done in disputes between persons and where the

[32] [2001] CILR 214

enforcement of the criminal law and the administration of justice - whether (in the Cayman Islands) or overseas - requires that disclosure be allowed.

... The disclosure of confidential information has been allowed and directed by this court in numerous cases, involving many different countries and many different legal issues and circumstances ... "

"One principle has, however, always remained constant here, as it has in all countries which share our common law heritage (and this is that): the law is not premised upon any presumption of wrongdoing.

...It follows that this court must stand ready the more so to reject any request for disclosure, which may proceed upon a presumption that the mere fact of doing business with a Cayman Islands financial institution, points to some reproachable objective such as tax evasion. Further, that the Cayman court will not direct the giving in evidence of confidential information without some assurance as to the limitations on its use or, for that matter, abuse."

51. And so it is that I believe, our courts will continue to strive to maintain the proper balance.

52. In closing, I would like to end on a positive note by reaffirming that, in my view, the trust concept remains and will remain a legitimate and important estate and succession planning tool, in the panoply of options available in the world of international finance. The process of innovation in the development of the trust concept, has had its foundation in careful attention by the Cayman courts and those of other Commonwealth jurisdictions to statutory and common law advancements. These have been construed in the context of the longstanding and fundamental legal principles which breathe life into the trust concept. Perhaps ironically, as I have noted above, nowhere is the trust concept more vibrant than in the world of commerce in the United States where, nonetheless, policy-makers are its most ardent detractors if the trust happens to be domiciled offshore. Such scepticism is not likely to abate but it will remain important that justification for it should not be found in the decisions of the courts on trust cases.

53. It is always to be remembered and emphasised, that the success of the offshore trust industry, growing as it has from its roots in English law, has depended on the willingness of the English courts and those in the leading offshore jurisdictions to develop common law and equity to ensure that those who might seek to exploit the "*dark side*" of the trust concept, will soon discover that they are most unwelcomed and will find no haven in our jurisdictions.

54. I thank you for your attention and hope that you continue to have an informative and enjoyable conference.

Hon. Anthony Smellie
Chief Justice of the Cayman Islands
June 19th / June 20th, 2013