



PORT HARCOURT LAW JOURNAL

From Learning to Wisdom



Volume 6 Number 1 March 2014

ISSN: 1595-1790

*Published by
Faculty of Law,
Rivers State University of Science and Technology,
Port Harcourt, Nigeria*

PORT HARCOURT LAW JOURNAL

The Port Harcourt Law Journal is a peer refereed journal published by the Faculty of Law, Rivers State University of Science and Technology, Port Harcourt Nigeria. It provides a forum for scholars and practitioners to reflect on diverse legal issues of national, regional and international significance and of local and regional relevance.

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*A Publication of the Faculty of Law, Rivers State University
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Vol. 6 No.1 April 2014

ISSN: 1595 - 1790

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OFFSHORE ASSET PROTECTION TRUSTS: A CATALYST TO SOCIAL AND ECONOMIC DEVELOPMENT IN NIGERIA[©]

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ABSTRACT

The demand for offshore and onshore structures to provide legal mechanisms for the defence of family property is significant. According to UK and US intelligence sources, 60 percent of all of the money in the world is held offshore. Industry specialists claim that some 40 percent of that amount is held in or under offshore trusts. In the past decades, the preferred vehicle has been the so-called asset protection trust. In many jurisdictions, the concept of trust as an ordinary instrument of planning of property management has been adapted in modern times to produce a very flexible medium of asset protection in the form of offshore trusts. Offshore centres include these trusts in an amalgam of products to attract investments from non resident individuals. The other attraction of these trusts is the tax advantages they offer either through the non residency rules or the Double Taxation Treaties. Although, the massive increase in the use of offshore trusts over the past 50 years, often in jurisdictions with either no, or inadequate, trust law, has led to a corresponding explosion in litigation. Yet, the importance of offshore trust in jurisdictions where it is being adopted and practised is enormous as it has brought tremendous economic development in those jurisdictions. It is against backdrop that this paper x-rays the concept of offshore trust, its characteristics and its advantages. This is with a view to recommending offshore trust business and necessary Act in Nigeria in order to enhance its economic development.

Keywords: Trust, offshore, settlor, assets, beneficiary, creditors and taxation

INTRODUCTION

Different people have customarily used trust¹ to plan for their future. The outstanding role that trusts play in creditor avoidance should not be astonishing. Emerge by accident, the 'Anglo-American Trust' has endured because it has been confirmed to be a potent device for accomplishing a wide range of objectives.² Having been acknowledged as a useful tool for gratuitous transfers, principally the transmission of wealth between one generation and the other,³ trust has also been considered as an essential commercial instrument.⁴ The accomplishment of trust has, to a greater extent, been attributable to its flexibility. This is because the spirit and intent of the trust is the separation of legal rules from beneficial ownership. That is, no inherent limitations exist on the purposes for which a trust may be created. A trust settlor has little reason to create a trust except some problems (usually a legal problem) make it less realistic for the settlor to utilise some other mechanism to achieve his objectives. Thus, it should not be out of place that, since their conception, settlors have repeatedly created trusts to avoid otherwise applicable legal rules.

As early as fourteenth century, landowners employed the use of trust (the precursor to the modern trust) both as a tax evasion mechanism and as a way to escape English ancient rules at a time when the law was yet to recognize will of land.⁵ During this period, some landowners adopted the use of trust to keep their lands "out of the clutches of creditors."⁶ However, as trust settlors used trusts to avoid legal rules, so also were the new legal rules which emerged to restrain trust settlors. This continued until between 1376 and 1377 when the British Parliament passed laws that weakened the attractiveness of the use as a creditor-avoidance device.⁷ One of such laws is the Statute of Uses that was passed in 1535. The Statute abolished the use of trust as a tax avoidance tool and reinstated the powers of king to collect feudal incidents.⁸ Practically, the give and take between property owners (through the instrumentality of their lawyers) and the state has been an ongoing one. Then, lawyers adapted trusts to serve their clients' interests, and the state responded by imposing constraints. In most cases, as with the Statute of Uses, the constraints were statutorily imposed, while in other cases,

¹ A trust is a 'fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person.' See Restatement (Second) of Trust 2 (1959)

² Stewart E. Sterk, "Asset Protection Trust: Trust Law's Race to the Bottom?" 85 *Cornell Law Review*, 2000, p. 3

³ John H. Langbein, "The Secret Life of the Trust: The Trust as an Instrument of Commerce" 107 *Yale Law Journal*, 1997, p. 165

⁴ *Ibid*, p. 166

⁵ Stewart E. Sterk, *op. cit.* p. 4

⁶ *Ibid*.

⁷ 1 *Rich 2*, (1377) Ch. 9 (invalidating efforts made by landowners to "Lords and other great men of the Real" in order to dissuade adverse claimants from pursuing claims against the land) See also 27 *Hen 8*, (1535) Ch. 10

⁸ W. S Holdsworth, "The Political Causes Which Shaped the Statute of Use" 1912 26 *Harvard Law Review* 1912, p. 108 as cited by Stewart E. S, *op. cit.*

as with the Rule Against Perpetuities, the constraints have developed through the common law process.⁹ This trend continued until the sixteenth century. From the late nineteenth century however, trust settlors have attempted to create different class of trusts, intended for different motives so as to protect their beneficiaries' interests.

OFFSHORE ASSET PROTECTION TRUSTS (OAPT)

The inability of the most often relied mechanism (self-settlor spendthrift) to provide settlors protection against unwanted litigation, publicity and insecurity triggered the search for alternative protection. Thus, an increasing number of wealthy people have turned to offshore asset protection trusts as an alternative.¹⁰ Some of the more popular locations for offshore asset protection trusts are Anguilla, the Bahamas, Barbados, Belize, Bermuda, the British Virgin Islands, the Cayman Islands, the Cook Islands, Cyprus, Gibraltar, the Isle of Man, Jersey, Malaysia, Mauritius, Niue, Saint Kitts and Nevis, and the Turks and Caicos Islands.¹¹ All of these are present or former British possessions where English is spoken and English common law is recognized.¹²

Traditional methods of asset protection include the use of corporations, limited liability partnerships, and, most recently, limited liability companies. These traditional models have been remoulded in recent years to include family limited partnerships. Such traditional business structures have suffered several setbacks as more ends-minded judges and sympathetic juries have looked beyond legal details and have pierced through these entities in their search for funds to satisfy judgments against businesses.¹³ Traditional methods for shielding personal assets have included transferring the personal assets into family limited partnerships or to the lower liability spouse. Transfers to spouses no longer remain a viable option for most Americans due to America's extraordinary divorce rate¹⁴ and to the unwillingness of most spouses to relinquish all legal control and ownership of assets to their spouses or children.

The current offshore asset protection industry is the response to the failure of these traditional methods.¹⁵ The offshore asset protection industry is a natural appendage of the estate and tax planning industry. Asset protection attorneys assist clients in completing an asset protection plan. The plan includes three parts: estate planning, tax minimization strategies, and judgment creditor planning. Indeed, with today's continuing

⁹ *Jee v Audley* 29 Eng Rep. 1186 (M. R. 1787)

¹⁰ Stephen G. Giles, "The Judgement- Proof Society" 63 *Washington & Lee Law Review*, 2006, p.603

¹¹ Barry S. Engel, *op. cit.* p. 212

¹² See Savanna Mapelli, "Judgment Proofing Your Wealthy Clients" *New Jersey Law Journal*, 1994, p. 32
The learned author states that legislators in various countries like Bahamas, Belize, Bermuda, Cayman Islands, Cook Islands, Cyprus, Gibraltar, and Turkey have "drafted special asset-protection trust legislation in order to attract the offshore trust business"; Gideon Rothschild, "Asset Preservation: Legal and Ethical Strategies" 1 *New York Law Journal*, 1994, p. 11

¹³ Ritchie W. Taylor, "Domestic Asset Protection Trust: The Estate Planning Tool of the Decade or a Charlatan?" 13 *Byu Journal of Public Law*, 1998, p. 2

¹⁴ Jonathan L. Mezrich, "It's Better in The Bahamas: Asset Protection Trusts for the Pennsylvania Lawyer" 98 *Dickson Law Review*, 1994, p. 2

¹⁵ Richard S. Amari, "Asset Protection Trusts: Nuclear Bomb Shelter" 66 *Florida Bar Journal*, 1992, p. 17

litigation explosion, asset protection may not only be a necessity for high net worth clients, but the estate planner may have an ethical duty to assist clients in either developing asset protection plans or referring them to those who specialize in the field.¹⁶ Clients who make the voyage offshore may realize numerous advantages in addition to asset protection. These advantages may include tax planning, international estate planning, global investing and banking, protection of privacy, facilitation of international business transactions, relief from regulatory burdens, reinsurance, shipping, and expatriation planning.¹⁷

What is Offshore Asset Trust? Where a settlor creates trust abroad and transfers his assets with the intention of retaining effective economic dominion over the trust as long as he can with a life interest in the income of the trust fund, coupled with a general power of appointment over its capital, both of which terminates upon his insolvency, after which the trustees hold the trust fund on discretionary trusts for the benefit of him and his family, he had created offshore trust. As between the trustee and the beneficiaries, a settlement in this form is – in English law- valid and enforceable.¹⁸ Engaging in Offshore Asset Protection Trust (hereinafter referred to as OAPT) is legal so long as the resulting asset protection device is not fraudulent. It can legitimately serve as a safeguard against financial uncertainty and unanticipated litigation.¹⁹ Many writers like Barry and Jonathan subscribe to the fact that offshore trust is a vehicle for people to protect their assets from peril.²⁰ On the other hand, only few condemn it in its strongest term.²¹ As far as the authors have been ascertain, the first experiments in this direction were made by settlors in the United States.²²

The ability of people to remove their chips from the table and continue to play, through use of asset protection, has helped fuel the phenomenal growth of offshore financial centres over the past 30 years. Today, an estimated one-half of the world's money supply passes yearly through offshore financial centres. This accounts for more than \$ 5 trillion annually.²³ The multi-faceted growth of these centres has been fuelled by a desire to obtain regulatory relief from burdensome United States governmental

¹⁶ Ritchie W. Taylor, *op. cit.* p. 3

¹⁷ David D. Beazer, "The Mystique of 'Going Offshore'" *Utah Bar Journal*, Dec. 1996, p. 19

¹⁸ Milton Grundy, John Briggs & Joseph A. Field, 'Asset Protection Trusts' ((3rd Ed), (London, Key Haven Publication, 1990), p. 27- 8

¹⁹ Amy Lynn Wagenfeld, *op. cit.*, p. 5

²⁰ See Barry S. Engel, *op. cit.*, Barry states that "the foreign situs asset protection trust can be a useful planning vehicle for wealthy people who wish to protect their assets from the perils of living in our modern-day society." And Jonathan L. Mezrich, *op. cit.*, Jonathan argues that asset protection is simply a reasonable reaction to today's 'court-happy' society, and should be allowed until the U.S. judiciary or legal community finds a way to stop damaging, frivolous lawsuits and litigiousness.

²¹ See specifically Randall J. Gingiss, "Putting a Stop to 'Asset Protection' Trust" *51 Baylor Law Review*, 1999, p. 7 who declares that asset protection trusts, be they offshore or domestic, offend the public policy of the overwhelming majority of American states. And Elena Marty-Nelson, *op. cit.*, who contends that offshore asset protection trusts invite U.S. settlors to defeat deep-seated public policy in this country.

²² Milton Grundy, John Briggs & Joseph A. Field, *op. cit.*, p. 28

²³ David Leigh, "Billions Hidden Offshore: Jersey Faces Tax Clampdown" *Guardian (London)* 26th Sept, 1984, p. 1

regulation, protect financial privacy, provide international investment opportunities, and, most recently, by a desire to achieve asset protection. People have resorted to anticipatory measures to protect their possessory property interests through use of asset protection techniques.²⁴ Asset protection allows clients to locate their assets in jurisdictions where the rules of litigation are friendlier to property owners. These jurisdictions are quite different from the plaintiff friendly court structure present in the United States. Many attorneys and clients consider asset protection to be levelling the judicial playing field, allowing both defendants and plaintiffs to enjoy "fair play" in litigation.²⁵

Currently, asset protection trusts are the most popular method of using offshore financial centres to achieve asset protection. It is estimated that over \$ 1 trillion of foreign trust funds are in asset protection trusts.²⁶ Offshore asset protection trusts are self-settled trusts established in foreign jurisdictions that recognize these trusts as entities separate from the grantor. Asset protection trusts arrived to fill the void left in the wake of judges allowing juries to pierce traditional liability limiting entities, such as corporations, limited liability partnerships, and limited liability companies, to satisfy judgments.²⁷ In addition to statutory protections afforded offshore asset protection trusts, offshore financial centres provide a beneficial choice of law situs for such trusts.²⁸

FEATURES OF OFFSHORE ASSET PROTECTION TRUSTS

Typically, offshore asset protection trusts have several common characteristics. Milton²⁹ recognises three features which are-(a) that the trust is governed by offshore law, (b) that the assets are themselves are offshore, and (c) that those who control the operation of the trusts (and the appointment of the trustees) are similarly offshore or in a sympathetic jurisdiction. The common features are more than these, others manifest as circumstances, new statutes and judicial pronouncements by courts unfold. Some of this are-;

i. Irrevocability of the trusts

Offshore asset protection trusts are usually irrevocable spendthrift trusts created under the laws of foreign jurisdictions to protect a settlor's assets from potential creditors.³⁰ Normally the beneficiaries of such trusts are the settlor's family members or the settlor himself. The trustee is a trust company or financial institution located in the foreign jurisdiction.³¹ The duration of the trust varies, with three possibilities: (1) a short

²⁴ Ritchie W. Taylor, *op. cit.*, p. 1

²⁵ *Ibid.*

²⁶ Elena Marty-Nelson, *op. cit.*, p.17

²⁷ Gideon Rothschild, "Establishing and Drafting Offshore Asset Protection Trusts" 23 *Estate Planning*, 1996, p. 66

²⁸ Ritchie W. Taylor, *op. cit.* p. 17

²⁹ Milton Grundy, John Briggs & Joseph A. Field, *op. cit.*, p. 49

³⁰ Amy Lynn Wagenfeld, *op. cit.*, p. 5

³¹ *Ibid.*

period of time, such as ten years, with a reversionary interest in the settlor; (2) a longer time period that is tied to the lives of the settlor or beneficiaries; or (3) the amount of time established by the laws of the trust jurisdiction.³²

ii. Weak or No Fraudulent Conveyance Law

One of the primary reasons assets are able to be seized in the jurisdictions is the Statute of Elizabeth. The Statute of Elizabeth, requiring fraudulent conveyances to be set aside, entered the English legal tradition in 1571.³³ All states in the United States have either retained the common law codified in the Statute of Elizabeth or have enacted a counterpart in either the Uniform Fraudulent Conveyance or Fraudulent Transfer Acts.³⁴ However, most offshore jurisdictions and financial centres have repealed the Statute of Elizabeth and replaced it with weaker fraudulent conveyance standards, making these centres more attractive for offshore asset protection trusts. For example, the Alaska Trust Act potentially weakens the ability of the creditors to reach assets under fraudulent conveyance law. Accordingly, to Alaska law, a fraudulent transfer occurs when 'made with intent to hinder, delay, or defraud creditors or other person.'³⁵ Thus in Alaska, the creditors have to prove the debtor's subjective intent regarding the transfer without the assistance of any objective factors. While in Cook Islands the law requires a creditor to prove beyond reasonable doubt that the settlor of the trust had actual intent to defraud before bringing the action, in Belize, there is no fraudulent conveyance statute at all thereby making fraudulent transfer possible.

iii. Short Statute of Limitation

One way fraudulent conveyance standards are weakened in offshore jurisdictions is through implementing shorter statutes of limitations for determining if a conveyance is fraudulent. Most common law jurisdictions have a statutory time period in which any conveyance can be undone in order to satisfy a judgment. The range for statutes of limitations for offshore jurisdictions varies from presuming no assets in the trust are fraudulently placed there³⁶ to a statute of limitation of one year³⁷ and two years.³⁸ Alaska amended its fraudulent conveyance law to require that the creditor prove both that the creditor was a pre-existing creditor and either that the "transfer was intended in whole or in part to hinder, delay, or defraud creditors or other persons" or that the trust is revocable by the settlor.³⁹ Pre-existing creditors of the settlor are given four years from

³² Susanna C. Brennan, *op. cit.*, p. 9

³³ Section 13 Statute of Elizabeth 1571

³⁴ Ritchie W. Taylor, *op. cit.*, p. 4

³⁵ Alaska Statute, s. 34.40.010

³⁶ Bankruptcy (Amendment) Ordinance 1990 42A (Gibraltar) This act provides that if a settlor is an individual and is not insolvent on the day of a registered transfer, then no creditor--existing or subsequent--can set aside the transfer.

³⁷ See International Trusts Act, 13 B (1996) (Cook Islands)

³⁸ See Bahamas Fraudulent Dispositions Act, s. 4 1991

³⁹ Alaska Statute, s. 34.40.110 (a) (1)

the transfer to make a claim on the assets or one year after the "transfer is or reasonably could have been discoverable by the person."⁴⁰ It appears that the discovery rule would take precedent over the four year rule. Although Alaska's asset protection trust protections are less generous than many offshore jurisdictions, these protections are fair to both creditors and debtors and allow for a reasonable time for discovery of the trust and to file a writ of attachment against any assets. Without exception, offshore jurisdictions will not allow, as a matter of law, an action to set aside a conveyance as fraudulent if the transaction between the creditor and debtor occurred after the funds were transferred into the trust.⁴¹

iv. Law of the situs and Recognition of Foreign Judgement

The trust instrument usually contains language directing that the law of the *situs* will govern the trust and that any interpretation of the trust will be determined in that jurisdiction. Perhaps, this is the greatest advantage offshore asset protection trusts have over their domestic cousins in a separate sovereign nation. A client using an offshore jurisdiction as his trust situs will be able to place the assets outside the reach of any court in the home jurisdiction.⁴² Furthermore, when selecting an offshore trust situs, an attorney usually advise a client that the greatest level of asset protection is achieved when the assets are placed in a jurisdiction that does not recognize foreign judgments, such as Nevis or the Cook Islands.⁴³

v. Anti-Duress Provision

Another major feature of OAPT is the insertion of anti-duress provision in the trust document. Offshore trusts also often include anti-duress provisions. Effective immediately upon a situation of duress, these provisions remove any powers retained by the settlor over the trust and place them in the trustee. The trustee is granted full power over the trust and may ignore any subsequent orders concerning the trust. In most cases, an anti-trust clause prohibits the trust from complying with any order impose upon the settlor, a domestic trustee or the foreign trustee.⁴⁴ Under this arrangement, the trust will specify which types of situations will cause the anti-duress provision to take effect, including the issuance of a court order from a jurisdiction other than the one governing the trust.⁴⁵ Thus, if a United States court orders the settlor to repatriate the trust's assets to the United States for bankruptcy or judgment purposes, the trustee may choose not to follow this order. Any demand by the settlor to follow the court's order has no effect because the settlor no longer has any control over the trust and its assets.⁴⁶ Additionally,

⁴⁰ *Ibid*, s. 34.40.110 (d)(1)

⁴¹ *Patterson v Shumate*, 504 U. S. 753 (1992)

⁴² Eric Henzy, "Offshore and 'Other' Shore Asset Protection Trusts" 32 *Vanderbilt Journal of Transnational Law*, 1999, p. 2

⁴³ Gideon Rothschild, *op. cit.*, p. 68

⁴⁴ James T. Lorenzetti, *op. cit.*, p. 70

⁴⁵ David C. L., *op. cit.*, p. 63

⁴⁶ Susanna C. Brennan, *op. cit.* p. 6

many trusts also contain a provision allowing the settlor to regain control once the duress situation has passed.⁴⁷ Thus, anti-duress provisions give the settlor the best of both worlds by taking away his control over the trust while its assets are in jeopardy, and then giving him back his control once the threat has passed.⁴⁸

vi. Bank Secrecy of Offshore Transactions

Another key procedural protection many individuals seek from offshore is bank secrecy. In this information age, a person's personal financial affairs can be pierced by credit bureaus and telemarketing agencies, all using a personal skeleton key -the person's social security number.⁴⁹ It is the general opinion worldwide that bank secrecy originated in Switzerland,⁵⁰ but this is not completely accurate. Under the English common law, all bankers had a duty not to divulge bank clients' financial records.⁵¹ Most offshore jurisdictions have strong statutory provisions protecting bank secrecy. Since bank secrecy no longer exists in some jurisdiction, a domestic asset protection trust is not a viable option for clients who feel they need the extra asset protection that financial privacy can provide.

vii. Settlor's High Level of Control over the Trust

Again, the typical asset protection trust will contain a number of protective devices that will enable the settlor to exercise some control over the trust property and protect against adverse changes in circumstances. These include: (1) a trust protector clause and (2) a non-binding letter of intent.⁵² A trust protector is someone who is appointed by the settlor to act as an advisor to the trustee and who is charged with making sure that the trustee carries out the settlor's wishes.⁵³ In some cases, the consent of the protector may be necessary for the trustee to perform certain acts.⁵⁴ In addition, the protector may be empowered to remove the trustee, change the beneficiaries or even change the situs of the trust.⁵⁵ In some extreme cases, the settlor appoints himself or his child as the protector.

⁴⁷ *Ibid.*

⁴⁸ See *Goldberg v Lawrence (In re Lawrence)*, 227 B. R. 907, (Bankr. S. D. Fla. 1998) and *Federal Trade Commissioner v Affordable Media LLC* 179 F.3d 1228 (9th Circuit 1999)

⁴⁹ For a discussion of the erosion of financial privacy, see Alexander C. Papandreou, "How to Keep your Personal Information Personal: Tips from the Privacy Rights Clearinghouse" 14 *Californian Registered Law Report*, 1996, p. 1; Alexander C. Papandreou, "KREBS v. Rutgers: The Potential for Disclosure of Highly Confidential Personal Information Renders Questionable the use of Social Security Numbers as Student Identification Numbers", 20 *Journal of College & University Law*, 1993, p. 79

⁵⁰ Eleven years before the Swiss enacted Article 47, which codified the Germanic custom of bank secrecy, the English courts recognized that right.

⁵¹ See *Tournier v. National Provincial and Union Bank of England*, (1924)1 K.B. 461

⁵² Richard C. Ausness, *op. cit.*, p. 8

⁵³ James T. Lorenzetti, *op. cit.*, p. 55

⁵⁴ Henry J. Lischer, *op. cit.* p. 60

⁵⁵ Paul M. Roder, *op. cit.* p. 22

viii. Flight Clauses

The ultimate safeguard for an asset protection trust is a flight clause. A flight clause instructs the trustee to remove the trust and its assets to another jurisdiction in the event the trust may, in the trustee's sole discretion, be under attack.⁵⁶ Such removal may be necessary in order to protect the trust's assets against threats of nationalisation, expropriation or political instability. This provision enables a trust to successfully hop around the world's scores of financial centres, avoiding detection, through bank secrecy, and further isolating the trust from attack. A flight clause can change the trustee or authorise the trustee to transfer the trust corpus to another jurisdiction.⁵⁷

ix. Validity of Self-settled Trust

The laws of offshore asset protection jurisdictions provide that self-settled trusts are valid. That is, assets in these trusts are not subject to the claims of creditors because the trust was self-settled.⁵⁸ For example, an offshore trust act may provide that "any rule of law or public policy which prevents a settlor from establishing a protective or a spendthrift trust of which he is a beneficiary is hereby abolished."⁵⁹ In 1997, the Alaska statute was amended to allow settlors to create spendthrift trusts.⁶⁰

x. Fee Shifting

Possibly, the greatest disincentive for judgment creditors to pursue offshore assets is the rule that the loser must pay all court costs.⁶¹ Offshore jurisdictions do not recognize foreign judgments; therefore, if a plaintiff wishes to pursue assets offshore in order to satisfy the judgment obtained in the home jurisdiction, the whole matter must be re-litigated. Furthermore, in addition to bearing his cost in the re-litigation, if the judgment creditor fails to prove actual intent to defraud, then the challenge to the validity of the trust will fail and the creditor will be responsible for all litigation costs incurred by the trust. This provision is, to a lesser degree, in Alaska. Fee shifting acts as a powerful mace in the hands of a debtor to beat his potential creditor into a more favourable settlement.⁶²

THE ADVANTAGES OF OFFSHORE ASSET PROTECTION TRUSTS

Before the enactment of asset protection trust in Alaska, Nevada and Delaware, Offshore Asset Protection Trusts seemed to be the game of the wise among the Americans. Hence, OAPTs became extremely popular for certain individuals. But their

⁵⁶ Ritchie W. Taylor, *op. cit.*, p.

⁵⁷ Richard C. Ausness, *op. cit.*, p.

⁵⁸ Eric Henzy, *op. cit.*, p. 5

⁵⁹ See section 12(4) of the Belize Trust Act of 1992

⁶⁰ See section 34.40.110 of the Alaska statutes

⁶¹ Fee Shifting is the rule in all common law offshore havens. See for example Susanne Di Pietro & Teresa W. Carns, "Alaska's English Rule: Attorney's Fee Shifting in Civil Cases," 13 *Alaska Law Review*, 1996, p. 33

⁶² Ritchie W. Taylor, *op. cit.*, p.

success was not solely due to the fact that there were no alternatives. Rather, their success emanated from the various advantages and protections they afforded settlors.⁶³ Generally, the advantages or benefits of OAPT's can be categorized into two groups: limitation of creditor access to the trust and increased settlor control of the trust.⁶⁴

The former of these general categories is perhaps most important. OAPT's greatly limit creditor access to the corpus of the trust.⁶⁵ This is accomplished in several ways. First, United States courts' judgments are not recognized in offshore havens.⁶⁶ Therefore, in the face of an international treaty or agreement with the United States regarding creditor's access to OAPT's, (which Offshore Assets Protection Trust countries do not have anyway) a creditor with a domestic judgment who tries to collect against a settlor of an Offshore Assets Protection Trust or attach his assets will fail almost all of the time.⁶⁷ In the alternative, even if a United States court cited an OAPT settlor for contempt based on his refusal to perform a specific order of the court, it is unlikely that the court could enforce the order due to impossibility of performance.⁶⁸ In 1983, the United States Supreme Court held that impossibility of performance was a complete defence against a contempt order.⁶⁹ Therefore, a properly drafted Offshore Assets Protection Trust makes adherence to a court order impossible.⁷⁰

Second, the Offshore Assets Protection Trust countries have legal systems that are less sympathetic to creditors. These legal systems are referred to as being "debtor friendly."⁷¹ Primarily, such debtor-friendly legal systems are aimed at protecting the multi-billion dollar trust industry.⁷² Thus, if a creditor was to pursue his action in a foreign court, he would face almost insurmountable obstacles. For example, most foreign attorneys do not work on a contingency fee basis. Instead, they often charge their fees up front. In addition, many foreign courts require the creditor-plaintiff to post bond before the suit commences.⁷³ This can be extremely expensive. Furthermore, if the suit does go to trial, the burden of proving a fraudulent conveyance is much higher in foreign courts. Most foreign courts utilize the "beyond a reasonable doubt" standard in fraudulent transfer actions rather than the "preponderance of the evidence" standard utilized in the United States.⁷⁴ In addition, OAPT havens have much shorter statutes of limitations. For

⁶³ Paul M Roder, *op. cit.*, p. 2

⁶⁴ Barry S. Engel, *op. cit.*, p. 222

⁶⁵ Elena Marty-Nelson, *op. cit.*, p. 17

⁶⁶ Nathan H. Bernstein, "The Formation of the Family Limited Partnership: Fraudulent Transfer Liability and Other Family Problems," 101 *Commercial Law Journal*, 1996, p. 80

⁶⁷ Paul M Roder, *op. cit.*, p. 5

⁶⁸ David D. Beazer, *op. cit.*, p. 22

⁶⁹ *United States v. Rylander*, 460 U.S. 752, 757 (1983); see also *United States v. Bryan*, 339 U.S. 323, 330-31 (1950).

⁷⁰ Paul M Roder, *op. cit.*, p.7

⁷¹ Elena Marty-Nelson, *op. cit.*, p. 14

⁷² *Ibid.*

⁷³ David D. Beazer, *op. cit.*, p. 25

⁷⁴ Nathan H. Bernstein, "The Formation of the Family Limited Partnership: Fraudulent Transfer Liability and Other Family Problems," 101 *Commercial Law Journal*, 1996, p. 84

example, the Bahamas, Cyprus and the Cook Islands all have two-year statutes of limitations,⁷⁵ whereas most United States jurisdictions that have adopted a version of the Uniform Fraudulent Transfer Act provide a four-year statute of limitations which, in most cases, is tolled until the fraud is discovered.⁷⁶

The third limitation on creditors' access to Offshore Assets Protection Trusts, leverage in settlement negotiations, is a result of the legal obstacles creditors face in foreign jurisdictions. When creditors realize that domestic judgments are unenforceable in foreign jurisdictions and that foreign legal systems clearly favour the settlor of Offshore Assets Protection Trusts, they are often forced to the bargaining table. More often than not, a settlement is reached between the creditor and the settlor in the settlor's favour.⁷⁷

THE DANGER OF OFFSHORE ASSET PROTECTION TRUSTS

The various advantages and benefits of Offshore Assets Protection Trusts may lead to erroneous belief that OAPT's are invincible, perfect, or as Barry put it "the most impervious asset protection planning tool available."⁷⁸ However, this always may not be the case.⁷⁹ This is because OAPT's is bedevilled with its own risks. Indeed, there are several risks that one must consider before establishing an Offshore Assets Protection Trust.

Among the risks associated with Offshore Assets Protection Trusts is the risk of a fraudulent conveyance which must be addressed first. If a settlor seeking to establish an OAPT already has identifiable creditors, the risk of a fraudulent conveyance is great.⁸⁰ A settlor may not divest himself of his assets in an effort to cheat his creditors.⁸¹ Generally, if a court does find a fraudulent conveyance, the creditor can undo the transaction. Most jurisdictions protect present though not subsequent creditors.⁸² However, courts will not protect "nameless, faceless persons" to whom the settlor is not yet indebted.⁸³ The key to a fraudulent conveyance basically is that the settlor of an OAPT must harbour an actual intent to defraud the creditor at the date of the transfer. Without such intent, the transfer of assets into an Offshore Asset Protection Trust would be considered prudent.

⁷⁵ Barry S. Engel, *op. cit.*, p.

⁷⁶ David F. Heroy & Lawrence M. Benjamin, *Defending the Fraudulent Conveyance Lawsuit, in Fraudulent Conveyances, Preferences, and Valuation* 608 (PLI Commercial Law & Practice Course Handbook Series 1992) p. 307

⁷⁷ Gideon Rothschild, *op. cit.*

⁷⁸ Barry S. Engel, *op. cit.*, p. 212

⁷⁹ Professor Elena has noted, that "virtually, all of the legal literature on offshore asset protection trusts has been contributed by practitioners specializing in the field. As such, the literature paints a fairly rosy picture of OAPT's." See Elena Marty-Nelson, *op. cit.*, p. 15

⁸⁰ Barry S. Engel, *op. cit.*, p. 214

⁸¹ *Ibid.*

⁸² James T. Lorenzetti, (n. 186 above) p. 138 See also *United States v. Chapman*, 756 F.2d 1237, 1240 (5th Cir. 1985)

⁸³ *Ibid.*

estate planning.⁸⁴

Other than fraudulent conveyance issues, one must also be aware of the growing domestic judicial and legislative concern with regard to Offshore Assets Protection Trusts. The United States is gradually adopting mandatory disclosure laws aimed at revealing the inner-workings of an OAPT⁸⁵ and no doubt other nations have follow suit. Furthermore, a recent federal bankruptcy case indicates the growing judicial concern over Offshore Assets Protection Trusts. In *In Re Portnoy*, the chief bankruptcy judge declined a debtor's motion for summary judgment by deliberately ignoring the choice-of-law provision contained in the OAPT document, instead insisting that New York law would apply to the action.⁸⁶ The Portnoy case seriously questions the protection afforded under Offshore Assets Protection Trust and indicates some judicial hostility toward Offshore Assets Protection Trusts.⁸⁷

Similarly, one must be cognizant of the fact that real property will always be governed by the situs of the property. For example, real property located in the United States jurisdiction is subject to domestic judgments, including attachment by creditors, and the title of such real property cannot be transferred to a foreign jurisdiction.⁸⁸ As with real property located within the United States, reversionary interests in Offshore Assets Protection Trusts can also be reached by creditors. Thus, if an Offshore Assets Protection Trust terminates within a specified period of time, with the settlor retaining a reversionary interest, upon termination creditors of the settlor can attach those assets.⁸⁹

CONCLUSION

It is not in doubt that OAPTs has a lot of benefit accruable to jurisdictions where it adopted. Not only that, it is certain that it protects debtor's asset from being taken over by creditor particularly where debt emanates after then creation of OAPT. Significantly, it boosts the economic development of OAPTs jurisdiction. From all indications, it seems OAPT flourishes in almost where it is practiced and significantly almost all these jurisdictions are common law jurisdiction –common law jurisdictions like Cook Islands, Cyprus, Gibraltar, the Isle of Man, Jersey, Malaysia, Mauritius, Niue, Saint Kitts and Nevis, and the Turks and Caicos Islands. All these jurisdictions have defendant court-friendly structured with liberal laws in favour of property owners. This is coupled with a lot of tax reliefs/ tax exemption regimes.

All these features palpably suit Nigerian situations and environment. This being so, the Offshore Asset Protection Trust is highly recommended for Nigeria. This is to be commenced with the enactment of OAPT Act by the National Assembly. Each OAPTs

⁸⁴ Paul M. Roder, *op. cit.*, p. 7

⁸⁵ James T. Lorenzetti, "The Offshore Trust: A Contemporary Asset Protection Scheme," 102 *Commercial Law Journal*, 1997, p. 138

⁸⁶ 201 B.R. 685, 692-94 (*Bankruptcy S.D.N.Y.* 1996)

⁸⁷ Phillip R. Rupprecht & Jonathan P. Friedland, "Fallout from Portnoy: Is There Bankruptcy Protection in an Asset Protection Trust?" 14(9) *Bankruptcy Strategist*, 1997, p. 1

⁸⁸ James T. Lorenzetti, *op. cit.*, p. 141

⁸⁹ Elena Marty-Nelson, *op. cit.*, p. 18

jurisdiction enacts different Law unique and suitable to such jurisdiction. Hence, various laws exist in these jurisdictions. Of all these laws, the Malaysia Labuan Act is strongly recommended to Nigeria. The reasons for adoption of Labuan Act are not far-fetched. Firstly, Malaysia and Nigeria share legal, political and social similarities. Thus, adoption of Malaysia Labuan Act in Nigeria will not pose any challenge. Secondly, in as much as the Malaysia Labuan Act protects settlors, it equally affords creditors to reach the property of settlor-debtor where the trust is created after the debt and with fraudulent intent. Also, Labuan Act affords settlors certain tax relief/ exemption for the first five years of creation. With this as a background, the proposed Nigerian OAPT's Act will also protect both settlors and creditors which should be the major rationale of OAPT's.

Upon presence of appropriate Law, effort should be made to incorporate companies that will manage the trust. Such companies may include government corporations, multinational companies and national companies with adequate experts in this area of business. Furthermore, a regulatory body will be required in order to monitor, regulate and advise these companies in their subsequent dealings with beneficiaries and settlors. It is believed that if these measures are put in place, many potential social and economic developments are coming alongside the operation of OAPT's in Nigeria.