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Cook Islands Asset Protection Trust Law

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COOK ISLANDS ASSET PROTECTION TRUST LAW

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The theme of these comments is derived from the name of the sponsoring body, *The Pepperdine University Journal of Business, Entrepreneurship and the Law*. Modern asset protection in the United States and the Cook Islands in all senses reflects the import of those three words: business, entrepreneurship and law.

I. HISTORY OF THE LAW

In 1989, the Cook Islands enacted the International Trusts Amendment Act (“ITAA”),¹ which amended the basic bare bones International Trusts Act (“ITA”),² enacted in 1982 when, as a result of a private initiative endorsed by the government, the Cook Islands parliament passed several companion acts establishing the offshore finance center.³ “Bare bones” does not, by the way, mean “bare trust”; the rule in *Saunders v. Vautier*⁴, whereby beneficiaries are absolutely

¹ International Trusts Amendment Act 1989 (Cook Is.) [hereinafter *ITAA*].

² International Trusts Act 1984 (Cook Is.) [hereinafter *ITA*].

³ Other legislation included the International Companies Act 1981-82, the Trustee Companies Act 1981-82, the Offshore Banking Act 1981, the Offshore Insurance Act 1981-82 and the International Partnerships Act 1984. *See also* The Limited Liability Companies Act 2008.

⁴ Craig & Ph. 240, 10 L. J. Ch. (N.S.) 354 (1841).

entitled to call for distribution of assets, which was repealed in the ITA.⁵

The Cook Islands has a unicameral parliamentary model inherited from the United Kingdom via New Zealand, which governed the Cook Islands until 1965 when the Cook Islands became self-governing and two countries entered into an arrangement of “free association.”⁶ While the Cook Islands has full and independent law-making capacity, the country is somewhat less than fully independent of New Zealand. Cook Islands law is an amalgam of adopted New Zealand statute law, New Zealand and English common law, Cook Islands statutes and a small body of Cook Islands common law. The ITA as amended is thus a statutory overlay to an existing body of English and New Zealand statute and common law including Cook Islands precedent as it relates to trusts.

The first business emphasis of the Cook Islands offshore center was on corporations, which enjoyed tax advantages for clients in New Zealand, Australia and elsewhere because of a simple and easily managed “control and management” test then-employed in those countries.⁷ In 1988, those advantages were removed when New Zealand adopted U.S. “controlled foreign corporation” concepts in their tax law.⁸

At about that time, a U.S. attorney’s interest in the toll of litigation on medical practitioners in this country led to meetings with a Cook Islands trust company. They agreed to draft legislation using trusts as the vehicle that, when passed by the Cook Islands parliament, would be tailored to protect U.S. clients from the ravages of random litigation in a legal environment where no entity could offer protection against potentially ruinous claims.⁹

Here we have a true meeting of entrepreneurial minds resulting in the ITAA 1989.¹⁰ While this was not the first time legislation in one country had been tailor-made to suit the requirements and aspirations of those in another,¹¹ it does represent something of a milestone in the innovative use of law in an offshore finance center to attract a clientele in another domestic jurisdiction, in this case the U.S.

The attraction to government in such a process is obvious. It gets annual registration fees, domestic taxes from the trust companies and their employees, and overall economic development is promoted. As well, trust companies have little or no physical or sociological impact on small island countries and the domestic tax base is preserved because offshore services are usually available only to non-

⁵ *ITA* § 10.

⁶ *See* COOK IS. CONST. (1964).

⁷ *See* New Zealand Government Budget, Wellington, Government Printer, June 1987.

⁸ Income Tax Amendment Act 1988, New Zealand; *see* the Income Tax Act 1994, subpart CG and Schedule 5, part A, New Zealand.

⁹ *See* Walter H. Diamond, Dorothy B. Diamond, & Barry A. Kaplan, 1 *International Trust Laws and Analysis*, 1000, (1995).

¹⁰ *ITAA*.

¹¹ On their independence beginning in the 1960’s, the UK Government established tax havens in several former colonies as a means of attracting sustainable revenues to small countries otherwise bereft of resources.

residents.¹² Trust companies operate relatively high value businesses with relatively few expatriate employees compared to other economic activities.

Trusts were chosen as the vehicle because property is legally held by one party, the trustee, for the benefit of others, the beneficiaries. Ownership is split between mutually interdependent legal and beneficial interests. A trust is not an entity like a corporation with a separate legal personality, but a legal relationship between the parties.¹³ That relationship is essentially one of contract.¹⁴ Thus, while the settlor is no longer the legal owner of trust property, he may still be a beneficiary subject to contractual terms.

II. AMENDMENTS TO THE LAW

The ITAA significantly modified the ITA and Cook Islands common law.¹⁵ For starters, the rule against perpetuities was abolished, although a vesting period may be included in a trust agreement if desired.¹⁶

Further, after the amendments, a trust¹⁷ is no longer void on a settlor's bankruptcy.¹⁸ Thus, the rights of a beneficiary in a spendthrift trust are not subject to seizure or attachment due to bankruptcy or insolvency.¹⁹

Section 13B(1)(a) added a provision allowing for law suits against trusts and/or settlors predicated on an assertion of a fraudulent conveyance. This provision applies to situations where the plaintiff-creditor asserts that the settlor fraudulently transferred property to the trust to bring about his insolvency and avoid the creditor's claim.²⁰ If the creditor's claim is proved,²¹ the trust is not void

¹² See, e.g., ITA § 22.

¹³ See Knight v. Knight, 49 E.R. 58, 3 Beav. 148 (1840).

¹⁴ See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995).

¹⁵ See, David Brownbill, *The Role of Offshore Jurisdictions in the Development of the International Trust*, *Vanderbilt Journal of Transnational Law*, V.32 1999.

¹⁶ ITAA § 6(1).

¹⁷ Reference to a trust throughout means an international trust as defined in section 2 of the ITA. Section 2 provides that an international trust is:

a trust which is registered under this Act and in respect of which:

(a) at least one of the trustees, including a custodian trustee, or in the case of a disposition granting powers of appointment, maintenance or advancement, at least one of the donors or holders of a power of appointment or power of maintenance or power of advancement, is either:

- (i) a registered foreign company; or
- (ii) an international company; or
- (iii) a trustee company; and

(b) the beneficiaries are at all times non-resident; and shall include, where the context so permits, a trust which is established or settled under the laws of another jurisdiction, but which, subject to paragraphs (a) and (b) of this definition, is registered as an international trust under this Act;

ITA § 11(2). This definition includes dispositions made in a trust. *Id.*

¹⁸ *Id.* § 13A.

¹⁹ *Id.* § 13F.

²⁰ *Id.* § 13B(1).

²¹ The standard of proof is "beyond a reasonable doubt." *Id.* § 13(B)(1).

or voidable – the claim must be satisfied from that portion of the trust assets equivalent to the amount claimed using a market value test.²² No other remedy is permitted. Therefore, the possibility that the plaintiff’s remedy will be in the form of a constructive or resulting trust is eliminated. Moreover, a trust shall not be void or voidable because it may defeat a claim held by reason of a settlor’s personal relationship to the settlor or heirship rights.²³

The amendments to the ITAA also addressed the time frame within which a fraud suit may be brought. The amendments provide that a trust shall not be deemed settled with intent to defraud a creditor if settled after two years from the date the creditor’s cause of action arose or, if within two years, the creditor fails to commence proceedings before one year from the date the trust was established.²⁴ A trust settled before the creditor’s cause of action arose is not settled with intent to defraud;²⁵ that is, claims based on “future fraud” are prohibited.²⁶ A settlor shall not have imputed to him an intent to defraud solely by reason that²⁷ the settlor (1) settled the trust within two years of the creditor’s cause of action arising; (2) retains certain powers of control and disposition; (3) is a beneficiary, trustee or protector; or (4) the settlor settled the trust at a time when proceedings by the creditor had been commenced. Proceedings to set aside a trust must be brought in the Cook Islands within two years of from the date of settlement of or disposition to the trust.²⁸

The ITAA amendments also established a number of procedural changes. The standard of proof required in a fraud claim is “beyond reasonable doubt.” Beyond a reasonable doubt is a higher burden than “balance of possibilities” used in civil cases and is usually reserved for criminal proceedings.²⁹ To have *locus standi*,³⁰ a plaintiff action must be brought within two years of a trust’s establishment, or within one year of the plaintiff’s cause of action having arisen.³¹ Trusts and proceedings involving trusts are subject to stringent privacy provisions including the requirement that proceedings be held *in camera*³² and that only reports approved by both counsel and the judge may be published.³³ In an attempt to highlight the security of trusts from government taking, the Crown guaranteed

²² ITAA § 13B(1).

²³ *Id.* § 3E(2)-(4).

²⁴ *Id.* § 13B(3).

²⁵ *Id.* § 13B(4).

²⁶ Note: this revokes application of the Statute of Elizabeth. Fraudulent Conveyances Act 1571, 13 Eliz. 1 Cap. 5 (1571).

²⁷ ITAA § 13B(5).

²⁸ *Id.* § 13K(D)(1)-(2).

²⁹ *Id.* § 13B(1).

³⁰ *Locus standi* is Latin for “standing,” that is, “[t]he right to bring an action or to be heard in a given forum.” BLACK’S LAW DICTIONARY, 960 (8th ed. 2004).

³¹ ITAA § 13K.

³² BLACK’S LAW DICTIONARY 775 (8th ed. 2004) provides a useful definition of *in camera*: “1. In the judge’s private chambers. 2. In the courtroom with all spectators excluded. 3. (Of a judicial action) taken when court is not in session.” Essentially, this definition shows the increased privacy accorded to proceedings held *in camera*.

³³ ITAA § 23(2).

that there should be no expropriation of the property of trusts except in accordance with due process of law, done for a public purpose, and with compensatory payment.³⁴

With regard to foreign judgments, a creditor seeking to enforce a claim relying on a foreign judgment may not enforce such claim until it can be shown that the creditor has exhausted all rights of appeal against the foreign judgment and all available remedies against the settlor's remaining property.³⁵ Moreover, foreign punitive damage awards are disregarded and unenforceable.³⁶ In an apparent attempt to reinforce the supremacy of domestic judgments, the ITAA amendments further provide that no foreign judgment is enforceable if the judgment is inconsistent with the ITA or the Trustee Companies Act, or relates to a matter governed by the laws of the Cook Islands.³⁷ ITAA § 13I goes on to state that no trust governed by Cook Islands law shall be void or voidable by reason that the trust avoids or defeats rights or claims conferred by a foreign jurisdiction or that the laws of the Cook Islands are inconsistent with any foreign law.³⁸ The amendments do not completely discount foreign law or judgments. Property that was "community property"³⁹ in a foreign jurisdiction before transfer to a trust may retain that status.⁴⁰

III. DUE DILIGENCE

Before a trust may be registered under the ITA⁴¹ the concerned trust company must be satisfied⁴² that the settlor has full right and title to the assets; that he remains solvent and able to pay reasonably anticipated debts after transfer of the assets to the trust; that the assets are not derived from prescribed unlawful activities;⁴³ that the information provided by the settlor is correct; and that the settlor has fully disclosed existing or reasonably anticipated legal proceedings against him.⁴⁴ The settlor must provide an affidavit of solvency and an affidavit as

³⁴ *Id.* § 27A; *see also* COOK IS. CONST. part IVA, § 64(1)(c).

³⁵ *ITAA* § 13B(13).

³⁶ *Id.* § 13B(14). Punitive damage jury awards in the U.S. are essentially unrestrained compared to the stringent rules limiting their application in other common law jurisdictions where financial punishment is conventionally a state prerogative expressed through the criminal law. *See generally* ERIK MOLLER ET AL., PUNITIVE DAMAGES IN FINANCIAL INJURY JURY VERDICTS (Rand Corp. 1997), available at http://www.rand.org/pubs/monograph_reports/2007/MR889.pdf (last visited May 19, 2010).

³⁷ *ITAA* § 13D.

³⁸ *Id.* § 13I.

³⁹ BLACK'S LAW DICTIONARY 317 (9th ed. 2009). Community property is "[a]ssets owned in common by husband and wife as a result of its having been acquired during the marriage by means other than an inheritance or a gift to one spouse, each spouse generally holding a one-half interest in the property." *Id.*

⁴⁰ *ITAA* § 13J.

⁴¹ *Id.* § 15

⁴² *See* Trustee Companies Due Diligence Regulations (1996) Reg. 4.

⁴³ *Id.* at 2. "Unlawful activities" include "financial misconduct" which includes concealment of assets. *Id.* at 7.

⁴⁴ *Id.* at 2.

to title and source of assets.⁴⁵

Trust company practice is to accept client referrals only from attorneys who are presumed to have adequately advised their clients on domestic rights duties and obligations. That, together with compliance with the due diligence requirements, is intended to prevent the use of trust registration as a device for fraud.

IV. RESPONSE TO THE AMENDMENTS

As stated in Newton's Third Law of Motion, "To every action there is an equal and opposite reaction."⁴⁶

Arguably, the most significant amendments are those imposing restrictive standards on litigation involving a settlor and trust and those disallowing deemed assumptions regarding a settlor's intentions. One need only compare the prospects of a trust governed by U.S. law under challenge to one governed by Cook Islands law.⁴⁷

The melding together of treatments for specific problem areas of U.S. law with robust amendments to English common law concepts brought criticism not only in the United States, but also in the English common law world.⁴⁸ Equally, it drew great interest, particularly from U.S. attorneys; so much so that a subcommittee on asset protection planning of the American Bar Association Section of Real Property Trust and Estate Law was established. A burgeoning conference circuit devoted to asset protection trusts developed in the 1990s. Scholarly articles emerged,⁴⁹ and business students will recognize the indicia of the beginning of a "product cycle."⁵⁰

While more pragmatic American lawyers appeared to simply want convincing that Cook Islands asset protection trusts actually worked, English lawyers harrumphed about what they saw as the torn tapestry of ancient equitable principals,⁵¹ and in particular the channeling of all claims under the ITA into a single funnel of expression.⁵² In the end, if an end is ever possible in legal debate, it has been recognized that, history notwithstanding, the "irreducible core" of obligations owed by trustees to the beneficiaries is the "duty of trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries."⁵³

⁴⁵ *Id.* at 4–6.

⁴⁶ SIR ISAAC NEWTON, *PHILOSOPHIAE NATURALIS PRINCIPIA MATHEMATICA* (1687).

⁴⁷ For a sampling of U.S. cases, see *In re Brooks*, 217 B.R. 98 (Bankr. D. Conn. 1998); *In re Brown*, No. 95-03072, 1996 WL 33657614 (Bankr. D. Alaska Mar. 11, 1996); *In re Lawrence*, 227 B.R. 907 (Bankr. S.D. Fla. 1998); *Riechers v. Riechers*, 679 N.Y.S.2d 233 (N.Y. Sup. Ct 1998).

⁴⁸ See, e.g., PETER WILLOUGHBY, *MISPLACED TRUST*, (Gostick Hall Publ'ns 1999).

⁴⁹ See, e.g., Michael A. Spielman, *Understanding Asset Protection Planning*, A.B.A. SEC. REAL PROP. PROB. & TR. L. (2007) (presented at the 18th Annual Estate Planning Symposium).

⁵⁰ See Raymond Vernon, *International Investment and International Trade in the Product Cycle*, 80 Q. J. ECON. 190 (1966).

⁵¹ See Charles A. Cain, *Trusts and Quasi-Trusts—What to Use and When*, 1 TR. & TRUSTEES & INT'L ASSET MGMT. 6 (1994).

⁵² *ITAA* § 13B(3).

⁵³ *Armitage v. Nurse*, (1998) Ch. 241, 253 (A.C.).

More compelling than the often-flawed lawyerly criticism,⁵⁴ is the evidence of acceptance through competitive forces at work. The advantage seized by the Cook Islands was quickly recognized by other offshore jurisdictions. Many simply adopted the whole ITA with a change of name.⁵⁵ There are now some sixteen offshore jurisdictions with some form of asset protection trust law.⁵⁶ None, though, has law as complete as the ITA which has been updated several times.⁵⁷ While most jurisdictions do not publish actual numbers of trust registrations, anecdotal evidence suggests that none have been as successful in attracting business as the Cook Islands.

As well as offshore jurisdictions, eight U.S. states now have forms of asset protection laws.⁵⁸ Unfortunately for U.S. domestic planning, there is currently no definitive U.S. Supreme Court opinion as to whether these state laws meet the Full Faith and Credit Clause of the Constitution.⁵⁹ Furthermore, there are the obstacles of the Supremacy Clause,⁶⁰ which allows federal bankruptcy law to prevail over state laws, and of the Contracts Clause,⁶¹ which precludes state laws from interfering with contractual obligations.

It was not until 2004 that the efforts of the National Conference of Commissioners on Uniform State Laws resulted in a Uniform Trust Code, which even in 2008 had been substantially adopted by only twenty states.

From a U.S. perspective, while Internal Revenue Service reporting rules changed for foreign grantor trusts in 1996,⁶² the government has otherwise evidently seen no need for a particular response to the development of asset protection trusts and relies on robust federal bankruptcy law.⁶³

Developments have, however, evolved in the financial area, and while not specific to trusts, have affected their operation, if not their effectiveness. In the 1990s, the Financial Action Task Force (“FATF”),⁶⁴ a body organized under the auspices of the Organization for Economic Co-Operation and Development (“OECD”) itself, a group of twenty-eight countries of which the United States is a

⁵⁴ See Cain, *supra* note 54; Charles A. Cain, Which Domicile?—A Crucial Question for APTs, 1 Tr. & TRUSTEES 6 (1995).

⁵⁵ See Nevis International Exempt Trust Ordinance, 1994 (Nevis), available at <http://www.nevisfinance.com/PDFS/NIETO%20%281994%29%20as%20Amended%20to%202002.pdf>.

⁵⁶ Such jurisdictions include Belize, Samoa, Mauritius, Cyprus, Turks & Caicos, and Gibraltar.

⁵⁷ To illustrate, the ITA has been updated in 1991, 1995–96, 1999, and 2004. See ITA.

⁵⁸ These states include Delaware, Alaska, Missouri, Nevada, Oklahoma, Rhode Island, South Dakota, and Utah. See also Asset Protection Corporation, Asset Protection Overview – State by State, <http://www.assetprotectioncorp.com/apbystate.html> (last visited Apr. 18, 2010).

⁵⁹ U.S. CONST. art. IV, § 1.

⁶⁰ U.S. CONST. art. VI, § 2.

⁶¹ U.S. CONST. art. I, § 10.

⁶² Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (codified as amended in scattered sections of 26 U.S.C.).

⁶³ See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

⁶⁴ See Financial Action Task Force, <http://www.FATF-GAFL.org> (last visited Apr. 18, 2010).

member, began pressing for the removal of what were then called harmful tax practices and strengthened anti-money-laundering law in offshore centers. The FATF was established following the debacle of the Bank of Credit and Commerce International (“BCCI”) scandal,⁶⁵ and significant World Bank and International Monetary Fund (“IMF”) funding in Eastern Europe following the collapse of the then-USSR, as it became apparent that significant portions of the funding had been quite simply looted and routed elsewhere via offshore centers.

While the OECD move against offshore centers’ allegedly harmful tax practices (a hotly debated proposition that low tax jurisdictions unfairly harmed high tax jurisdictions) suffered early setbacks and was put aside for a time, the anti-money-laundering move gathered strength and resulted in publication by the FATF of a black-list of countries that, it said, had no such laws, inadequate laws, or were “uncooperative.” Adoption of the list by the Financial Crimes Enforcement Network of the U.S. Department of the Treasury resulted in many American banks refusing, for a time, transactions to and from listed countries.

After the events of September, 11, 2001, Congress passed the Patriot Act.⁶⁶ In the international arena, the FATF was then naturally placed to assume greater responsibility for anti-money-laundering processes, and removal from the “black-list” became an urgent imperative for those countries listed under threat of losing the ability to conduct ordinary banking transactions in U.S. dollars (“USD”).

In the Cook Islands, this process resulted (with assistance from the IMF) in the establishment of a Financial Intelligence Unit,⁶⁷ other new or upgraded legislation⁶⁸ and satisfaction of FATF requirements.

In 2008–09, the OECD and FATF renewed the campaign against low-tax jurisdictions’ allegedly harmful tax practices, this time focusing on exchange of information and adopting the proven threat of black-listing from its anti-money-laundering campaign. The result was a flurry of tax treaty agreements incorporating exchange of information protocols, Tax Information Exchange Agreements (“TIEA”) by and between offshore jurisdictions, domestic trading partners, and complete stranger countries, all seeking to meet the FATF minimum of ten such treaties by the end of 2009. That date has passed, but the process continues without penalty to any country thus far.

The Cook Islands has currently entered into treaties with New Zealand, Australia, the Netherlands, Ireland, and the Nordic Council (Iceland, Denmark, Norway, Sweden, Finland, Greenland, and the Faroe Islands). It intends, in 2010, to enter into TIEAs with Mexico, Greece, Italy, and Korea. When enabling legislation has been enacted, a peer review process will be undertaken to verify efficacy of implementation of the TIEAs.

Unfortunately for OECD/FATF policy makers, it is apparent that countries concerned about possible black-listing are entering into agreements with other

⁶⁵ See S. COMM. ON FOREIGN RELATIONS, 102D CONG., THE BCCI AFFAIR, (S. Print 1992).

⁶⁶ USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁶⁷ See Financial Transactions Reporting Act 2003 (Cook Is.)

⁶⁸ See *id.*; see also Banking Act 2003 (Cook Is.); Financial Supervisory Commission (Qualifications of Compliance Officers) Regulations 2004 (Cook Is.); Money Changing and Remittance Businesses Act 2009 (Cook Is.); Insurance Act 2008 (Cook Is.).

countries with which they have no trade or other natural ties simply to meet or exceed the TIEA target.

V. COOK ISLANDS CASES⁶⁹

The High Court of the Cook Islands was established pursuant to the Constitution.⁷⁰

Judges must be or have been judges of the High Court, Supreme Court, or Court of Appeal of New Zealand, or practicing as a barrister in New Zealand or in any other part of the Commonwealth⁷¹ for not less than seven years. Since 1965, only judges or former judges of the High Court of New Zealand have been appointed judges of the High Court of the Cook Islands.

This procedure has provided the Cook Islands with a well-qualified judiciary on the one hand, and on the other avoided, thus far, the sometimes regrettable lapses evident in some offshore jurisdictions where there is a locally appointed judiciary that is perhaps inexperienced or even beholden to local or other interests. While these factors are by no means peculiar to offshore jurisdictions,⁷² prospective clients are typically alert to potential ethical influences.

Reporting on Cook Islands proceedings involving trusts is subject to the ITA.⁷³ The decision of the court in any proceedings may, unless ordered otherwise by the court as to the whole or any part of the decision, be published.⁷⁴ In practice, this means that counsel agree on amendments to the decision, which, when approved by the presiding judge, may be published. Counsel invariably delete reference to names and other aspects that might identify parties.

Reference is made in these reports to a “*Mareva* injunction.”⁷⁵ This is a temporary court order, usually sought *ex parte*, that freezes assets in the hands of a defendant to prevent their dissipation or removal from the jurisdiction pending a substantive hearing. The order originates in English admiralty law, where the order prevented the asset, a ship, from simply leaving the jurisdiction. The related “Anton Piller” order freezes documents in the hands of a defendant pending a substantive hearing.⁷⁶ The U.S. equivalent is a “temporary restraining order.”

⁶⁹ The Cook Islands does not have an official law reporting service. Cases referred to in this section are cited by reference to nomenclature of the Pacific Islands Legal Information Institute (“PacLII”), an initiative of the University of the South Pacific School of Law at Vila, Vanuatu. See Pacific Islands Legal Information Institute, <http://www.pacii.org> (last visited Apr. 18, 2010).

⁷⁰ See *supra* Part IV.

⁷¹ Other parts of the Commonwealth include an association of the United Kingdom and former colonies of the United Kingdom established by the Statute of Westminster 1931. Statute of Westminster (22 & 23 Geo V c 4, Dec. 11, 1931) U.K.

⁷² See, e.g., *United States v. Scruggs*, 356 F.3d 539 (4th Cir. 2004); see also Debra Cassens Weiss, *Scruggs Pleads Guilty; Plus a Profile of the “King of Torts,”* A.B.A. SEC. LEGAL ETHICS, Mar. 14, 2008, http://www.abajournal.com/news/article/scruggs_pleads_guilty/.

⁷³ See ITAA § 13B(4).

⁷⁴ ITA § 23(1)–(3).

⁷⁵ See *Mareva v. Int’l Bulk Carriers* (1975) 2 Lloyd’s Rep. 509 (A.C.).

⁷⁶ See *Piller KG v. Mfg. Processes Ltd.* (1976) 1 Ch. 55 (A.C.); see also *EMI Ltd. v. Pandit*, (1975) 1 All ER 418 (Ch.).

In the following case notes, I have sought primarily to isolate reasons for decisions as a guide to those who wish to look beyond the bare words of the statute. To this end, most fact situations have been omitted.

A. Pacific Heritage Bank v. Radke

This case concerned the time limits for beginning a suit.⁷⁷ The defendant's partnership interest was transferred to the trustee on October 15, 1992.⁷⁸ The plaintiff acknowledged that this date was the date his cause of action arose.⁷⁹ Default under the defendant's loan agreement with the plaintiff occurred on December 1, 1992.⁸⁰ Plaintiff did not become aware of the disposition to the trust until January 17, 1994.⁸¹

The plaintiff was unable to overcome section 13B(3)(b), which states: "A . . . trust shall not be fraudulent as against a creditor of a settlor if the creditor fails to bring such action before the expiration of 1 year from the date such . . . disposition . . . took place."⁸²

Plaintiff argued that "fails" meant "to neglect," "not remember" or "not choose" to act and that here, the date on which he became aware of the disposition should be the starting date, January 17, 1994. Plaintiff's action began in the Cook Islands on October 6, 1994.⁸³

The court applied what it said was the basic rule of construction and gave the words their ordinary meaning and held that the action was time-barred because it did not fall within the one-year period provided for in section 13B(3)(b).⁸⁴

B. 515 S. Orange Grove Owners Association v. Orange Grove Partners

515 S. Orange Grove Owners Association v. Orange Grove Partners, ("Orange Grove cases") comprises of several parts.⁸⁵ The first two decisions relate to the grant of a *Mareva* injunction and an appeal against the cancellation of the injunction in the first case.⁸⁶

⁷⁷ *Pac. Heritage Bank v. Radke*, (1994) CKHC 8: 168 1994, available at <http://www.pacii.org/cgi-bin/disp.pl/ck/cases/CKHC/1994/8.html?query=Radke>; *Pac. Heritage Bank v. Radke*, (1994) CKHC 9: 168. 1994, available at <http://www.pacii.org/cgi-bin/disp.pl/ck/cases/CKHC/1994/9.html?query=Radke>.

⁷⁸ *Pac. Heritage Bank v. Radke*, (1994) CKHC 9.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *ITAA* § 13B(3)(b).

⁸³ *Pac. Heritage Bank v. Radke*, (1994) CKHC 8.

⁸⁴ *Pac. Heritage Bank v. Radke*, (1994) CKHC 9.

⁸⁵ See *515 S. Orange Grove Owners Ass'n v. Orange Grove Partners*, (1995) CKHC 3: 208 .1994, available at <http://www.pacii.org/cgi-bin/disp.pl/ck/cases/CKHC/1995/3.html?query=515 S. Orange Grove Owners>; *515 S. Orange Grove Owners Ass'n v. Orange Grove Partners* (1995) CKHC 9: 208.1994, available at <http://www.pacii.org/cgi-bin/disp.pl/ck/cases/CKHC/1995/9.html?query=515 S. Orange Grove Owners>.

⁸⁶ See *515 S. Orange Grove Owners Ass'n v. Orange Grove Partners*, (1995) CKHC 3; *515 S. Orange Grove Owners Ass'n v. Orange Grove Partners*, (1995) CKHC 9.

A *Mareva* injunction was obtained by the plaintiff, and the defendants, including the trustee, sought to have it removed.⁸⁷ The plaintiff alleged *inter alia* that the trustee's acts were "fraudulent, unconscionable, and [without probity and] . . . to the prejudice of the plaintiffs."⁸⁸

The court found that there was no evidence of this allegation and that the ordinary conduct of the trustee's business activities did not give rise to such a conclusion.⁸⁹

On appeal, the arguments narrowed to the construction of section 13B(8).⁹⁰

The appeal presented two cases: one where the claimant relied on the date of an act or omission to establish a cause of action; and one where the claimant brought an action on a judgment.⁹¹ The court held that in this case the latter provision applied, reasoning that the date the California judgment relied on was the appropriate date and that the plaintiff's claim was made within the time limit. Accordingly, the *Mareva* injunction was restored.⁹²

The court evidently had in mind the fact that had discontinuance of the *Mareva* injunction been confirmed, the plaintiff's suit would have been precluded without a substantive hearing on the merits. The court was apparently loath to permit this and adopted the plaintiff's argument differentiating dates in then-subsection (8) when the words themselves do not on their face bear this out.

The amended subsection deletes the reference to an "action upon a judgment," and now defines the term "cause of action" by reference to "the earliest cause of action capable of assertion by a creditor against the settlor of an international trust . . . by which that creditor has established (or may establish) an enforceable claim against that settlor."⁹³

A curious (by today's standards) argument was then heard by the court when the plaintiff argued for publication of the judgment entered on November 6, 1995. This argument was opposed by the defendants, who relied on section 23(2).⁹⁴ The court concluded that it would be wrong to suppress publication, and judgment in accordance with this reasoning was delivered on December 5, 1995.

The respondent-defendants then sought leave to appeal against the publication judgment of December 5, 1995, though not against the principal judgment restoring the *Mareva* injunction. Appeal, if allowed, would be to "Her Majesty the Queen in Council,"⁹⁵ otherwise known as the Privy Council, comprising judges of the English House of Lords. This historical right of appeal to the English court system survives from colonial times when new colonies did not

⁸⁷ 515 S. *Orange Grove Owners Ass'n v. Orange Grove Partners*, (1995) CKHC 9.

⁸⁸ See 515 S. *Orange Grove Owners Ass'n v. Orange Grove Partners*, (1995) CKHC 3.

⁸⁹ *Id.*

⁹⁰ See 515 S. *Orange Grove Owners Ass'n v. Orange Grove Partners*, (1995) CKHC 9; ITAA § 13B(3)(b). (section 13B(8) was amended following final resolution of this case to clarify provisions relating to the meaning of the phrase "cause of action").

⁹¹ See 515 S. *Orange Grove Owners Ass'n v. Orange Grove Partners*, (1995) CKHC 9.

⁹² *Id.*

⁹³ ITAA § 13B(8)(b).

⁹⁴ ITA § 23(2).

⁹⁵ See Privy Council (Judicial Committee) Act 1984 § 3(2) (Cook Is.).

have senior experienced judges and small colonial populations engendered the risk of conflicts of interest. New Zealand, Australia, and Canada have discontinued the right of appeal.

To succeed, such an application must demonstrate that “the question (to be appealed) is one which by reason of its great general or public importance or otherwise, ought to be submitted.”⁹⁶

The respondent-defendants argued that publication of the decision would irreparably harm the jurisdiction. The court held that the arguments did not meet the test of “great general or public importance,” and the application for leave was denied. The ITA now provides that edited decisions shall be published unless so ordered otherwise by the court.⁹⁷

C. *Case No.2 (1996) CKHC 2: CA Complaint No.36 of 1996 Court of Appeal*

Plaintiffs learned in February 1996 that on the same facts as in the *Orange Grove cases*, the “Victor Trust,” a second trust had been established (the “Evangeline Trust”). After a *Mareva* injunction was obtained, the trustee sought discharge of the *Mareva* injunction on the basis that the action was time-barred under section 13B because the settlement took place before the creditor’s cause of action arose.⁹⁸ The plaintiffs argued that the words “accrued” and “or had arisen” created different dates. The court adopted the words “or had arisen” to establish that the plaintiffs’ claim was not time barred.

The *Orange Grove cases* resulted in substantial revision of sections 13B and 13K in the 1999 amendment,⁹⁹ such that the objections and differing points of interpretation found by the court in support of their decisions in the five hearings above were met by a legislative response. It is characteristic of offshore jurisdictions that, in the absence of strong domestic pressures and the protracted debate that usually generates, amendment of commercially oriented legislation such as the ITA can be achieved quickly and usually without dissent.

D. *In re XYZ Irrevocable Trust*

This is the telemarketing case well known by reference to parallel U.S. litigation¹⁰⁰ and the subject of extensive commentary.¹⁰¹

This was an application for directions by the trustee, ABC, of the XYZ trust regarding management and administration of the trust constituted in July 1995 by

⁹⁶ *Id.*

⁹⁷ ITA §23 (3).

⁹⁸ ITAA § 13B(4).

⁹⁹ International Trusts Amendment Act 1999 (Cook Is.), 1999 Cook Islands Sessional Legislation, No. 3.

¹⁰⁰ *In re XYZ Irrevocable Trust* (1999) CKHC 5; OA 6.1999, available at [http://www.pacii.org/cgi-bin/disp.pl/ck/cases/CKHC/1999/5.html?query=CKHC;4FTCV.AffordableMedia,LLC,179F.3d1228\(9thCir.1999\)](http://www.pacii.org/cgi-bin/disp.pl/ck/cases/CKHC/1999/5.html?query=CKHC;4FTCV.AffordableMedia,LLC,179F.3d1228(9thCir.1999)).

¹⁰¹ See David R. McNair, *Anderson in the Court of Appeals – Contempt, Impossibility and Foreign Trusts*, TR. & TRUSTEES, Sept. 1999, at 27.

Mr. and Mrs. A (the “A’s”), as settlors and co-trustees, along with ABC.¹⁰² The A’s were also protectors of the trust.¹⁰³

In May 1998, the A’s informed ABC that the Federal Trade Commissioner (“FTC”) had obtained a temporary restraining order against them in the United States District Court of Nevada ordering them *inter alia* to repatriate their assets to the U.S. and provide an accounting of those assets to the FTC.¹⁰⁴

In June 1998, ABC informed the A’s that by reason of an “event of duress,” as defined in the trust agreement, they had automatically ceased to be co-trustees of the trust.¹⁰⁵ The event of duress was that they had been the subject of an action the aim, purpose or effect of which was the acquisition, expropriation or confiscation of any of the assets comprising the property of [the] trust.¹⁰⁶ ABC declined to comply with the temporary restraining order on the basis that to do so would have been in breach of clauses thirty-four and forty-two of the trust agreement.¹⁰⁷ Those clauses precluded any “Excluded Person,” as defined in the trust agreement, from taking any benefit under the trust.¹⁰⁸ As a result, the United States District Court made an order for the imprisonment of the A’s for contempt of court.¹⁰⁹

In July 1998, A advised ABC of his imprisonment, and said he had been requested by the FTC and the United States District Court to procure the consent of his children to the repatriation of the assets and that if he was able to do so, the court would then order A’s release.¹¹⁰ ABC again declined to release the funds.¹¹¹

In November 1998, A advised ABC that the FTC and the United States District Court were considering other options. The A’s attorneys formed a new Cook Islands international company (“CI”), the sole shareholder of which was the FTC.¹¹²

On December 18, 1998, the A’s executed a Deed of Removal and Appointment of Trustee by which they purported to remove ABC as trustee and appoint CI as the new trustee. ABC rejected the deed as invalid.

On December 22, 1998, a further deed was executed by the A’s and CI, described as a Deed of Amendment, the purpose of which was to amend the original deed by excluding the FTC from the definition of Excluded Person.

On the same day, the A’s executed a declaration of resignation whereby they resigned as protectors and purported to appoint CI as substitute protector.

¹⁰² See Adrian Taylor, *Cook Islands High Court Denies Repatriation of Trust Assets to the US*, 7 FIDUCIA 1, (Asiaciti Trust Group Singapore) available at <http://www.rjmintz.com/anderson2.html> (last visited June 6, 2010).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *In re XYZ Irrevocable Trust* (1999) CKHC 5.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See *supra* McNair note 101, at 32.

¹⁰⁹ See *supra* Taylor note 102, at 32.

¹¹⁰ *In re XYZ Irrevocable Trust* (1999) CKHC 5.

¹¹¹ *Id.*

¹¹² *Id.*

For the present proceedings, the A's executed affidavits deposing that the documents had been reviewed by their American attorneys prior to being executed and had been executed "on [A's] own volition without duress."

The court had to determine two issues; whether the deeds and declaration were executed under duress and whether the effect of the documents was to confer a benefit on an Excluded Person.¹¹³

Duress: While it seems likely that the attorney drafting the trust agreement intended duress to include a court order for imprisonment for contempt, the judge found that the A's affidavits as to their execution of the documents without duress had not been challenged and that the withholding of release from prison for contempt of court was lawful according to Nevada law and that the documents were therefore not void on this ground.¹¹⁴

Excluded Person: The trust agreement provided that the protector could not exercise any power for the benefit of an Excluded Person.¹¹⁵ The definition of Excluded Person in the trust agreement included all "court, administrative and judicial bodies, except for the court, administrative or judicial bodies organized and empowered under the laws of the Cook Islands."¹¹⁶ Additionally, it included any and all creditors, claimants, judgment creditors etc. of any Settlor, of any Trustee, or any Discretionary Beneficiary, or any other Beneficiary under the settlement.¹¹⁷

Chief Justice Quilliam said the issue was not whether or not CI was an Excluded Person (it was clearly not), but whether the purpose of the three documents was for the "benefit" of an Excluded Person.¹¹⁸

That, in turn, required a determination as to whether the FTC was an administrative body. The court held it was, and further that it fell within the ambit of "claimant," another prohibited class.¹¹⁹ The court also drew support from the FTC's attempt to change the definition of Excluded Person.¹²⁰ The Deed of Amendment was held to be invalid as having been executed by the settlors in purported exercise of a power at a time when, because of an event of duress, they no longer had.¹²¹

E. United States of America v. A Ltd.

The FTC was awarded twenty million dollars (against A's company)

¹¹³ See *supra* McNair note 101, at 32.

¹¹⁴ Chief Justice Quilliam stated that the only authority he had found which may apply was a brief passage stating, "The question whether imprisonment or threatened imprisonment does or does not constitute duress depends on whether the imprisonment is lawful or unlawful." 9 Halsbury's Laws of England at ¶ 710.

¹¹⁵ *In re XYZ Irrevocable Trust* (1999) CKHC 5.

¹¹⁶ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *In re XYZ Irrevocable Trust* (1999) CKHC 5; see also *supra* Taylor note 102, at 32.

primarily to compensate defrauded customers.¹²² The customers were not themselves deprived of their right to sue.¹²³ The award provided that, in the event reparation became impractical or the amount awarded exceeded that required for reparation, the surplus was to be paid to the U.S. Treasury as an “equitable discourage remedy.”¹²⁴

The FTC sued in the Cook Islands to recover trust assets and the trustee ABC objected that this amounted to the enforcement of a public law of a foreign state.¹²⁵

The court adopted the established proposition of English law that, “English [and thus Cook Islands] courts have no jurisdiction to entertain an action; for the enforcement, either directly or indirectly, of a penal, revenue, or other public law of a foreign state; or founded upon an act of state.”¹²⁶

Held: The Federal Trade Commission Act of 1914 was a regulatory provision to prevent and control fraudulent and otherwise illegal trading. Powers given the FTC included those to obtain judgments in excess of appropriate redress and to pay any funds to the U.S. Treasury. It was the substance of the interest sought to be enforced which determined whether this was a public law rather than the form of action. The action taken by the FTC was taken to enforce the law and was at least partly penal. It was also a public law sought to be enforced by a foreign state for regulatory purposes and it would not be enforced in the Cook Islands.¹²⁷

It is perhaps indicative of the willingness of English and, by reference, Cook Islands courts, compared to the evident reluctance of the United States Supreme Court to entertain foreign precedent, that Chief Justice Greig, in his judgment, referred favorably to decisions where U.S. precedent has been applied or approved.¹²⁸

F. *A v. B*

This is the bookstore case (in three parts) which, like *In Re XYZ Irrevocable Trust* above, was the subject of well-publicized parallel U.S. litigation.¹²⁹

Part one concerned the plaintiff’s interlocutory application for an order for discovery, which the defendant resisted on the ground that to give discovery would

¹²² United States of America v A Ltd [2001] CKHC 4, available at [http://www.paclii.org/cgi-bin/disp.pl/ck/cases/CKHC/2001/4.html?query=CKHC 4](http://www.paclii.org/cgi-bin/disp.pl/ck/cases/CKHC/2001/4.html?query=CKHC%204).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See 1 DICEY & MORRIS, THE CONFLICT OF LAWS, 97 (12th ed. 1993).

¹²⁷ Attorney General v. Ortiz, 1 A.C. 1 (P.C. 1984), *aff’d* by Attorney-General v. Heinemann Publishers Austl. Pty Ltd., 10 N.S.W.L.R. 86 (1987).

¹²⁸ See *Huntington v. Attrill* (1891) A.C. 150 (P.C. 1893) (applying the tests in *Wis. v. Pelican Ins. Co.*, 127 U.S. 265 (1888) and *Attorney-General v. Wellington Newspapers Ltd.*, (1988) 1 N.Z.L.R. 129, where Justice Cook approved Dr. D. F. Mann’s article *The International Enforcement of Public Rights* (1987)).

¹²⁹ *A v. B* (2002) CKHC 5, available at [http://www.paclii.org/cgi-bin/disp.pl/ck/cases/CKHC/2002/5.html?query=CKHC 5](http://www.paclii.org/cgi-bin/disp.pl/ck/cases/CKHC/2002/5.html?query=CKHC%205); *Bank of Am.v. Weese*, 277 B.R. 241 (D. Md. 2002).

constitute a criminal offence under section 23(1) of the act.¹³⁰

Then section 23 provided that; “Except where the provisions of this act require and subject to this section, it shall be an offence for a person to divulge or communicate to any person information relating to the establishment, constitution, business undertaking or affairs of a trust.”¹³¹

The court held that the words “except where the provisions of this act require” imply that if something had to be done to make the statute work, it was permissible to allow it.¹³² The approach should be to “work out a practical interpretation appearing to accord best with the general intention of parliament as embodied in the act.”¹³³

The provisions requiring discovery in the case are those in section 13.¹³⁴ That provision would be rendered useless if there could never be full and proper discovery, especially bearing in mind that the creditor carries the unusually heavy onus of proving beyond reasonable doubt that there was either an intent to defraud or that the settlement rendered the insolvent without property by which the creditor’s claim, if successful, could be satisfied.¹³⁵ The application for discovery was approved.¹³⁶

A. *A v. E & Ors.*

Part two concerned a further interlocutory application by the plaintiff concerning the defendant’s claim of privilege in respect of discoverable documents.¹³⁷

Plaintiff alleged that the documents claimed privilege for categories of documents where advice was sought or given to allow the first defendants to commit a fraud.¹³⁸ Particulars of the fraud alleged to be sufficient to justify inspection by the court included:

The dishonest acts and intentions of the first defendants as assisted and promoted by lawyers and/or advisors as can be proved and/or inferred from the following

The establishment and creation of the trust,

The transfer of assets to the trust; and

At a time when an arbitration case was pending against the first

¹³⁰ See Privy Council (Judicial Committee) Act 1984, §23(1) (It is significant to note that section 23 was amended after this decision).

¹³¹ *A v. B* (2002) CKHC 5.

¹³² *Id.*

¹³³ *Id.*, *Northland Milk Vendors Assoc. Inc v Northern Milk Ltd.* (1988) 1 N.Z.L.R. 530 (Williams, J. approving).

¹³⁴ *A v. B* (2002) C.K.H.C. 5.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *A v. E & Ors.*, (2002) C.K.H.C. 4, available at [http://www.paclii.org/cgi-bin/disp.pl/ck/cases/CK HC/2002/4.html?query=Case No.2 \(1996\) CKHC 2](http://www.paclii.org/cgi-bin/disp.pl/ck/cases/CK HC/2002/4.html?query=Case No.2 (1996) CKHC 2).

¹³⁸ *Id.* 10.

defendant and.

The effect (of the transfers) was to leave the first defendants unable to meet their obligation to the plaintiff.

The first defendants denied the allegations. There was no dispute that the court had the right to inspect the documents. The central issue for determination [was] the scope and application of the so-called fraud exception to the rules.¹³⁹

In traversing the rationale of the law, Justice William noted that since at least the decision in *The Queen v. Cox*,¹⁴⁰ the law recognized an exception where communications are made with intent to facilitate a crime or fraud.

Since this was the first Cook Islands case to consider the exception in the context of a claim under section 13B, the judge reviewed New Zealand, English and Australian case law and reports of both the New Zealand and Australian Law Reform Commissions.¹⁴¹

“The theme of the cases and the various suggested codifications is one of dishonest purpose. The scope of the fraud exception goes beyond deceit or fraud *simpliciter* and catches any commercial practice or business dealing that would readily be described as dishonest to the point of fraud by a reasonable businessman.”¹⁴² Justice Williams discussed the Court of Appeal in the *Orange Grove cases*¹⁴³ where, he said the court “rejected an argument that the purpose of the Cook Islands trust legislation was purely and unashamedly the soliciting of funds and giving of protection against creditors exercising their rights.”¹⁴⁴

On the standard of proof required, it was noted that a mere allegation is insufficient and there must be “some prima facie evidence.”¹⁴⁵ However, in this case, Williams considered that because section 13B requires proof beyond a reasonable doubt, something more was required, namely the standard proposed by the New Zealand Law Commission, “a strong prima facie case of fraud or dishonest purpose.”¹⁴⁶

Williams also cited *Viscount Finlay in O’Rourke v. Derbyshire*:¹⁴⁷

The court will exercise its discretion, not merely in terms in which the allegation [of fraud] is made but also as to the surrounding circumstances for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communication.¹⁴⁸

¹³⁹ *Id.* 16.

¹⁴⁰ *The Queen v. Cox*, 1884 14 Q.B. 153 (1884).

¹⁴¹ *A v. E & Ors*, (2002) C.K.H.C. 4.

¹⁴² *Id.*

¹⁴³ *Id.* (“[W]e would be loathe to interpret the International Trusts Act as a statute which was intended to give succor to cheats and fraudsters by totally excluding the legitimate claims of overseas creditors.”).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *O’Rourke v. Derbyshire*, (1920) A.C. 581 at 604.

¹⁴⁸ *A v. E & Ors*, (2002) C.K.H.C. 4; *see also* *Clark v. United States*, 289 U.S. 1, 15 (1933).

On the facts, Williams held that the plaintiff had satisfied the strong prima facie test by reference to the establishment of the trust in the shadow of impending arbitration and judgment.¹⁴⁹

B. E and Another v. A

Part three was an appeal against Justice Williams' above decision to the Cook Islands Court of Appeal.¹⁵⁰ The court approved Williams' "strong prima facie" test and the application of that test to the facts.¹⁵¹ The appeal was denied.¹⁵²

VI. CONCLUSION

After twenty years the Cook Islands International Trusts Act remains a robustly utilitarian and effective estate protection tool for U.S. clients notwithstanding sometimes voracious criticism from U.S. commentators, courts and other offshore finance centers. The competitive advantage achieved by the Cook Islands has been recognized. The ITA has been copied and emulated in other offshore jurisdictions and the asset protection trust concept adopted in some U.S. states. While U.S. decisions now seem to focus on impossibility issues in contempt proceedings,¹⁵³ Cook Islands cases demonstrate a focus on issues relating to ITAA section 13B.¹⁵⁴ A body of Cook Islands precedent is building up which demonstrates both the seriousness of the purpose of Cook Islands courts and the application of familiar conceptual treatments in well-reasoned judgments.¹⁵⁵ To meet the evidentiary criteria of the ITA, Cook Islands cases demonstrate the critical need for stringent analysis of a potential client's affairs before a trust plan is implemented.

¹⁴⁹ *A v. E & Ors*, (2002) C.K.H.C. 4.

¹⁵⁰ *E and Another v. A* (2003) CKNZCA 1; CA 8.2002, available at [http://www.pacii.org/cgi-bin/disp.pl/ck/cases/CKHC/2002/4.html?query="A v. E"](http://www.pacii.org/cgi-bin/disp.pl/ck/cases/CKHC/2002/4.html?query=).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See, e.g., *Eulich v. United States*, No. 3:99-CV-1842-L, 2009 WL 2870004 (N.D. Tex. Sept. 4, 2009).

¹⁵⁴ Section 13B is the ITAA section corresponding to a fraud claim. See *supra* Part II.

¹⁵⁵ See *supra* Part IV-V.