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TRUSTS AT HOME AND ABROAD

As a result of the World Trade Centre terrorism of 11 September 2001, attention is being focused upon charitable trusts that may have been operating as a front for terrorist organisations. This could so easily have been the case in many offshore jurisdictions where the Attorney-General's responsibility for charitable trusts is very nominal and largely ignored, especially when there is no requirement of registration of charities, tax exemption for them not being a consideration in a tax-haven.

No doubt, pressure will be brought (via the USA, UK and the Financial Action Task Force) against these jurisdictions to take steps (perhaps by creating a statutory Charity Commission) to ascertain the existence of charitable trusts and to check that their funds have been genuinely used for charitable purposes. If funds have not been so used, then the trustees will need to be replaced and to restore the money discovered to have been lost (upon falsification of the accounts), except to the extent the trust was a sham trust run to the orders of the settlor whose directions had simply been obeyed by the trustees who (or whose officers) will need to be aware of potential criminal charges and of extradition treaties.

At home, there have been two interesting developments. In elucidating beneficiaries' *private law* rights to complain of decisions made by trustees acting arbitrarily, irrationally or perversely to any sensible expectation of the settlor, recourse is being had to the *public law* terminology of legitimate expectations (of beneficiaries) and of trustees acting with *Wednesbury Corporation* unreasonableness in reaching a decision that no reasonable body of persons properly directing themselves could have reached. Such recourse is unnecessary and must not be allowed to mislead some judge into considering that the views of beneficiaries entitled in default of an appointment must be heard before exercise of a discretionary power of appointment: the trustees can be in a position properly to exercise their discretion without seeking written or oral representations from affected persons.

The idea that trustees must be properly informed, so that their actions can be set aside if they ignored a relevant factor or took account of an irrelevant factor, has increased the burdens of trustees. Indeed, in the pensions fund context, where beneficiaries have earned their interests as deferred pay, a beneficiary need only prove that the trustees *might* have acted differently but for ignoring a relevant factor: *AMP(UK) Ltd v Barker* (2001) 3 ITEL 414. In the private family trust context it seems likely that a beneficiary has to prove that the trustees *would* have acted differently.

It is, however, open to the trustees to claim they would have acted differently but for overlooking very relevant tax rules creating an unappreciated significant tax liability, so that the court has declared their actions void: *Green v Cobham* [2000] WTLR 1101, *Abacus Trust v NSPCC* [2001] WTLR 953, (2001) 3 ITEL 846. It seems too good to be true to permit one class of taxpayer to undo what has been done while other classes of taxpayers cannot achieve such magical results. The Revenue was not a party to these two cases: it may well argue that the court should hold the trustees' decision to be voidable so that a valid tax liability can arise before the decision was avoided. After all, the trustees had capacity to do what they decided to do even though it was in breach of their duties. Some further fascinating litigation is in prospect.

Professor David Hayton