USING NEW ZEALAND TRUSTS TO ESCAPE OTHER COUNTRIES' TAXES

MICHAEL LITTLEWOOD[1]

ABSTRACT

The New Zealand tax system was until recently so structured as to allow foreigners to use the country as a tax haven. Specifically, it allowed them to use trusts established in New Zealand (referred to as "foreign trusts") to avoid and evade the tax they would otherwise have had to pay in their home country. It would seem to have been possible, too, for foreigners to use such trusts for other illicit purposes, in particular money-laundering and financing terrorism. In April 2016 the publicity given to the Panama Papers attracted attention to this aspect of the New Zealand tax system. The government responded by appointing a distinguished accountant, John Shewan, to advise. He recommended that the law be changed and the government accepted his recommendations. This paper explains how the foreign trust rules work, and how the amending legislation was designed to preclude this form of abuse.

I. INTRODUCTION

In 1988 New Zealand law was amended in ways which allowed foreigners to use the country as a tax haven. Specifically, it allowed them to use trusts established in New Zealand (referred to as "foreign trusts") to avoid or evade the tax they would otherwise have had to pay in their home country. The fact that New Zealand could be used as a tax haven was well known among the country's tax professionals, but until recently it attracted little public interest. That changed on 3 April 2016 when various media organisations published stories about the so-called Panama Papers.[2] The fact that it was

---

[1] University of Auckland Law School. An earlier version of this paper was presented at the Anti-Money Laundering and Countering Financing of Terrorism Conference 2016, a joint venture between ACAMS (the Association of Certified Anti-Money Laundering Specialists) and the FIU (the Financial Intelligence Unit of the New Zealand Police), Te Papa Main Auditorium, Wellington, 15 September 2016 and published as Michael Littlewood "Foreign Trusts, The Panama Papers and the Shewan Report" [2017] New Zealand Law Review 59. See further Littlewood n 19.

[2] See for example Juliette Garside, Holly Watt and David Pegg, "The Panama Papers: how the world's rich and famous hide their money offshore", *The Guardian* (online ed, London, 3 April 2016). See also New Zealand Government, *Government Inquiry into Foreign Trust Disclosure Rules*, June 2016 (hereafter *Shewan Report*) at Part 3 and Appendix 2.

possible to use New Zealand as a tax haven consequently attracted media commentary both in New Zealand and in other countries.[3]

It was suggested also that foreigners might have used trusts established in New Zealand as vehicles for money-laundering and perhaps even for the financing of terrorism.[4] Evidence of such activities is in the nature of things hard to come by, but, as it happens, a recent decision of the New Zealand High Court – *Low Hock v Rothschild Trust (Schweiz) AG*[5] – is intriguingly revealing of the nature of the uses to which foreign trusts might have been put. The Rothschild bank group, acting for a Malaysian family, had set up several trusts in New Zealand, holding assets in the US worth about US$265 million (a private jet, a hotel in Beverley Hills and other real estate in New York and Los Angeles) and other assets (the value of which was not disclosed) in Singapore, Hong Kong and the UK;[6] and the US government had commenced proceedings in California, seeking forfeiture of the trusts' US assets, on the ground that they were "traceable to an international conspiracy…to launder money misappropriated from 1Malaysia Development Berhad (1MDB), a strategic investment and development company wholly owned by the Government of Malaysia" and were consequently "derived from violations of United States law, including money laundering offences".[7] The New Zealand litigation came about because the trustees, who were subsidiaries of the Rothschild group, had declined to resist the US government's claims; and the beneficiaries had therefore applied to have them removed as trustees and replaced by companies controlled by themselves. Toogood J, in the New Zealand High Court, made the orders sought, emphasising, however, that he was expressing no views on the merits of the US government's claims or of the applicants' case against them.[8] The US government is presumably still pursuing its claims, and the new trustees are presumably resisting them.

In the wake of the publicity given to the Panama Papers, the New Zealand government initially denied that there was a problem[9] but a fortnight later on 19 April 2016 it changed course and engaged a distinguished Wellington accountant, John Shewan, to review certain aspects of the law relating to foreign trusts.[10] Shewan submitted his report to the government on 20 June 2016.[11] Unsurprisingly, he recommended that the

---

[3] See for example Isaac Davison, "Panama Papers: Key defends offshore banking comments", *New Zealand Herald* (online ed, Auckland, 6 April 2016); Tim Hunter, "Shame of Panama Papers may force government action", *National Business Review* (online ed, Auckland, 4 April 2016); Neil Chenoweth, "The Panama Papers: Behind Mossack Fonseca's secret New Zealand deals" *Australian Financial Review* (online ed, Melbourne, 6 May 2016) reproduced in *Shewan Report* at 66.

[4] See for example interview with Gerard Ryle, Director of the International Consortium of Investigative Journalists (Guyon Espiner, Morning Report, Radio New Zealand, 8 April 2016), describing New Zealand as "a very nice front for criminals" and the government's position (that New Zealand was not a tax haven) as "rubbish". See also *Shewan Report* at [7.14]-[7.15] and [10.6].

[5] *Low Hock v Rothschild Trust (Schweiz) AG* [2017] NZHC 25.

[6] At [3], [13] and [18].

[7] At [3], [13] and [14].

[8] At [4], [25] and [40].

[9] Jane Patterson, "NZ's 'world-class' tax system defended" Radio New Zealand, 4 April 2016 (quoting the Prime Minister, John Key) http://www.radionz.co.nz/news/political/300644/nz's-'world-class'-tax-system-defended; John Key (5 April 2016) 712 NZPD 10139-10144.

[10] "Establishment of the Government Inquiry into Foreign Trust Disclosure Rules" (19 April 2016) 33 *New Zealand Gazette* 1.

[11] John Shewan, letter to Bill English (Minister of Finance) and Michael Woodhouse (Minister of Revenue), 20 June 2016 (reproduced in *Shewan Report* front pages).

law should be changed. Specifically, he said that the disclosure requirements were inadequate, and that foreign trusts should be obliged to disclose more information than before.[12] The government accepted Shewan's recommendations and introduced legislation giving effect to them. The legislation was enacted on 21 February 2017 and the relevant provisions came into effect on that date.[13]

Before proceeding further, two preliminary points require mention. First, it may be as well to make clear that this paper is *not* concerned with the avoidance or evasion of New Zealand taxes. The New Zealand tax system, like all tax systems, is susceptible to avoidance and evasion, but that is not what the paper is about. Rather, it is about foreigners using trusts set up in New Zealand as a means of escaping the taxes they would otherwise have had to pay in *other* countries – in particular, the countries in which they live.

Secondly, whether New Zealand was a tax haven was a vexed question. The reason for this, however, was not that there was any doubt about the facts, but merely that people disagreed about how "tax haven" should be defined. If "tax haven" is defined as meaning "a jurisdiction that does not tax incomes", then plainly New Zealand was not a tax haven. A more useful definition, however, is that a tax haven is "a jurisdiction that allows itself to be used by non-residents as a means of avoiding or evading the tax they would otherwise have to pay in their home countries". By this definition, New Zealand was plainly a tax haven. In April and May 2016, the Prime Minister stated that New Zealand required "extensive disclosure" of foreign trusts, that the country did not permit secrecy and that it was therefore not a tax haven.[14] All that can be said about this is that he would appear to have been poorly briefed, for, as will be seen, New Zealand law generally allowed foreign trusts to operate without making any meaningful disclosure at all. In any event, even if New Zealand was not a tax haven (in other words, even if an unhelpfully narrow definition of the term was used), it was nonetheless possible for non-residents to *use* the country as a tax haven – that is, to avoid or evade the taxes they would otherwise have had to pay in their home country.[15]

II. USING NEW ZEALAND AS A TAX HAVEN

The easiest way to explain how New Zealand law allowed non-residents to use the country as a tax haven is by way of a hypothetical example. Suppose a resident of Portugal owned a forest in Indonesia, and produced income by arranging for the trees to be chopped down and sold. The income derived from the forest would have been

[12] *Shewan Report* at [1.2]-[1.3].

[13] Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, s 2.

[14] John Key (5 April 2016) 712 NZPD 10139-10144; (10 May 2016) 713 NZPD 10881; "'Utterly incorrect' – Prime Minister John Key denies Panama Papers are evidence NZ is a tax haven" *New Zealand Herald* (online ed, Auckland, 9 May 2016); Pattrick Smellie, "Key faces sustained questioning on NZ presence in 'Panama Papers'" *National Business Review* (New Zealand, online ed, 4 April 2016).

[15] The proposition that New Zealand was not a tax haven was sometimes based on the fact that the OECD had not classified it as such. Although this was true, the argument was unconvincing because the OECD has failed to identify as tax havens several jurisdictions that are obviously tax havens – for example, Switzerland, Luxembourg and Hong Kong: see for example OECD, *Towards Global Tax Co-operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs: Progress in Identifying and Eliminating Harmful Tax Practices*, 2000 at [8].

taxable in Indonesia, albeit at a relatively low rate.[16] It would also have been taxable in Portugal, at a relatively high rate. There would not have been any double tax, because the taxpayer would have been entitled to a tax credit in Portugal for the tax paid in Indonesia.[17] That is, he (or she, but it seems reasonable to suppose that the owners of income-producing offshore assets were mostly men) would have been able to set off against his liability to tax in Portugal the tax that he paid in Indonesia, so in Portugal he would have paid the difference between the Portuguese rate of tax and the Indonesian rate of tax. The end result would have been that his overall rate of tax would have been the same as if he had simply paid tax in Portugal at his marginal rate of tax; and since ownership of income-generating offshore assets correlates with income, he is likely to have paid tax in Portugal at the highest rate.

It was commonly possible, however, for persons in such circumstances to substantially reduce their liability to tax by using a trust set up in New Zealand.[18] This was typically arranged by an advisor resident in New Zealand. The advisor could have been a law firm, an accounting firm or a firm having no professional qualifications at all – for New Zealand law does not require any kind of professional certification of persons supplying advice as to the setting up and administering of trusts. In other words, anyone who wants to can go into business setting up and administering trusts for foreigners or, for that matter, for New Zealand residents, without any qualifications at all. In any event,

---

[16] The point of this paper is to show how New Zealand could be used as a tax haven. The other countries referred to – Portugal, Indonesia and so on – are merely used to illustrate the operation of New Zealand law. Thus, whilst authority (generally statutory) is cited for propositions of New Zealand law, it would seem unhelpful to burden the paper with authority for general statements as to how other countries' tax laws operate. The reason for using Portugal as an example is that until recently there were no arrangements in place for the New Zealand and Portuguese governments to exchange information related to tax (whereas New Zealand had entered into a double tax agreement or DTA with most other OECD member states and these DTAs all provided for the exchange of information). New Zealand could be seen, therefore as a doubly safe tax haven, from the Portuguese point of view, in that (a) the New Zealand government generally held no useful information about foreign trusts and (b) even if it held useful information about a foreign trust established for a resident of Portugal, there was no mechanism in place for it to supply that information to the Portuguese government. There is still no DTA between New Zealand and Portugal but both countries are now party to the Convention on Mutual Administrative Assistance in Tax Matters; see generally Adrian Sawyer, "The implications of the Multilateral Convention and the Foreign Account Tax Compliance Act: An Australasian perspective" (2015) 44 Australian Tax Review 1. See also Philip Baker, "The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion Profit Shifting" [2017] British Tax Review 281; Angelo Nikolakakis, Stephane Austry, John Avery Jones, Philip Baker, Peter Blessing, Robert Danon, Shefali Goradia, Johann Hattingh, Koichi Inoue, Juergen Luedicke, Guglielmo Maisto, Toshio Miyatake, Kees van Raad, Richard Vann and Bertil Wiman, "Some Reflections on the Proposed Revisions to the OECD Model and Commentaries, and on the Multilateral Instrument, With Respect to Fiscally Transparent Entities" [2017] British Tax Review 295.

[17] Such credits are usually available either under a double tax treaty (DTA) between the two countries or, in the absence of a treaty, under the "home" country's domestic law. Some countries' tax laws provide for exemptions rather than credits.

[18] John Prebble has written extensively about the New Zealand tax treatment of foreign trusts. See for example John Prebble, "New Zealand Trusts in International Tax Planning" [2000] British Tax Review 554. See also Jeremy Beckham and Craig Elliffe, "The Inconvenient Problem with New Zealand's Foreign Trust Regime" (2012) NZJTLP 166; Alison Pavlovich, "Trustee Residence in New Zealand: Is it Relevant and how is it Determined?" (2015) 21 NZJTLP 317; Mark Brabazon, "Trust Residence, Grantor Taxation and the Settlor Regime in New Zealand" (2016) 22 NZJTLP 346; David Simcock, "The Taxation of Trusts" (2007) 13 NZJTLP 20 at 31-34; Vicki Ammundsen, *Taxation of Trusts* (3rd ed, Wolters Kluwer, Auckland, 2016).

the firm incorporated a company (let us call it Abracadabra Ltd), owned by itself or by some other entity controlled by it. The Portuguese resident then transfered the forest in Indonesia to the company to hold on trust for himself and for members of his family. The firm provided whatever was required in the way of administering the trust in accordance with the wishes of the Portuguese settlor.[19]

The result was that the profits derived from the forest were still taxable in Indonesia, as before. But no tax was payable in Portugal and no tax was payable in New Zealand. No tax was payable in Portugal because the income was no longer the income of anyone resident in Portugal. Rather, it was the income of the company; and the company was resident in New Zealand, not Portugal. And no tax was payable in New Zealand because, whilst a person resident in New Zealand is generally taxable on his or her worldwide income,[20] ss CW 54 and HC 26(1) of the Income Tax Act 2007 provide for an exemption.

Section CW 54 provides:

> To the extent to which section HC 26 (Foreign-sourced amounts: resident trustees) applies to a foreign-sourced amount that a trustee who is resident in New Zealand derives in an income year, the amount is exempt income.

And s HC 26(1) provides:

> A foreign-sourced amount that a New Zealand resident trustee derives in an income year is exempt income under section CW 54 (Foreign-sourced amounts derived by trustees) if—
>
> (a) no settlor of the trust is at any time in the income year a New Zealand resident who is not a transitional resident; and
>
> (b) the trust is not—

[19] I first used Portugal as an example in March 2015. See Michael Littlewood, "Using New Zealand as a Tax Haven: How is it Done? Could It be Stopped? Should it be Stopped?", a paper presented at meetings of the New Zealand Branch of the International Fiscal Association (IFA) on 13 March 2015; the Law and Economics Association of New Zealand (LEANZ) on 30 April 2015; the University of Auckland Law School on 25 August 2015; the Association of Certified Anti-Money Laundering Specialists (ACAMS) on 30 November 2015; and the New Zealand Police Asset Recovery Unit on 17 December 2015. The paper is available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2761993. In December 2016, when I was revising this paper for publication, Jose Mourinho (the Portuguese currently employed as the manager of Manchester United Football Club) was outed as one of the affluent foreigners who had set up a trust in New Zealand. His trust is called the Kaitaia Trust: see "NZ link to Mourinho tax accusations" *New Zealand Herald* (online ed, Auckland, 12 December 2016); Bobby McMahon, "This Week In Soccer Biz: Ronaldo And Mourinho Snared In Soccer's Equivalent Of The "'Panama Papers'" *Forbes* (online ed, Jersey City, 4 December 2016). According to *The Sunday Times*, "Mourinho, 53, has earned more than £120m in salary since he first came to the Premier League as the Chelsea coach in 2004. He has a personal fortune of £50m, according to The Sunday Times Rich List, making him the sixth wealthiest sports star in the country. Despite his earning so much money, his advisers have gone to extraordinary lengths to help him avoid tax on the further millions he was paid by his club and other businesses for the use of his image rights to endorse products." Jonathan Calvert, George Arbuthnott and David Collins, "Mourinho's millions and the taxman" *The Sunday Times* (online ed, London, 4 December 2016). Until these recent accounts were published, I had no knowledge of any aspect of Mourinho's finances.

[20] Income Tax Act 2007, s BD 1(5).

(i) a superannuation fund; or

(ii) a testamentary trust or an inter vivos trust of which a settlor died resident in New Zealand (whether or not they died in the income year).

In summary, a New Zealand resident's income is exempt from tax where:

1. he (or she or it) is a trustee (and receives[21] the income in that capacity); and
2. the settlor of the trust is not resident in New Zealand; and
3. the income is derived from an asset situated somewhere other than New Zealand; and
4. the beneficiaries are not resident in New Zealand.

In the hypothetical given here, these criteria are satisfied because:

1. Abracadabra Ltd held the forest as a trustee (and received the income in that capacity); and
2. The settlor was resident in Portugal, not New Zealand; and
3. The forest was situated in Indonesia, not New Zealand; and
4. The beneficiaries were resident in Portugal, not New Zealand.

If the trustee acted as a mere conduit – that is, if it simply distributed the income to the beneficiaries in Portugal – then they would have been liable to tax in Portugal. So that is not what happened. Rather, the trustee got the money to the beneficiaries in some other way. For example, the trustee might have accumulated the income for a few years and *then* distributed it to the beneficiaries; and that way it might have counted as a non-taxable capital distribution, rather than as taxable income. Or the trustee might have *lent* the money to the beneficiary; and then some years later forgiven the loan. Or the trustee might have purchased a house in Lisbon (or anywhere else in the world, other than New Zealand) and allowed the beneficiary to live in it rent-free. Or the trustee might have used the income to acquire further income-producing assets. Thus the relatively low amount of tax paid in Indonesia would have constituted the whole of the burden. From Portugal's point of view, New Zealand had functioned as a tax haven.

Quite apart from these methods of tax avoidance, there was also scope for evasion. That is, the trustee might have distributed the funds to the beneficiary in some way unlikely to be detected by the Portuguese revenue authority (for example, by paying them into a bank account in a country other than Portugal); and the beneficiary might have disregarded his obligation to include the receipt in his Portuguese tax return. Again, from Portugal's point of view, New Zealand had functioned as a tax haven.

III. THE FOREIGN TRUST INDUSTRY

There are several New Zealand law firms, accounting firms and other firms that set up and run trusts for non-resident clients. The scale of the industry is difficult to gauge but

[21] The Income Tax Act 2007 generally refers to income being "derived" rather than "received". See Income Tax Act 2007, s BD 3. But for current purposes the distinction is irrelevant.

it is said to have been generating NZ$24 million to NZ$40 million per year in fees[22] and perhaps significantly more.[23] The number of foreign trusts has increased over the last decade and as of 31 December 2016 there were about 11,750 of them,[24] but virtually no data have been published as to the value of the assets held in them. One reason for that is that even the Inland Revenue Department (the IRD or the Department) appears to have little idea of the value of the assets, but it seems likely that the total runs to hundreds of billions of dollars and perhaps more. As indicated above, the *Low Hock* case[25] revealed that the trusts set up in New Zealand by a single settlor (or, at least, a single family) held assets in the US worth about US$265 million and other assets (the value of which was not disclosed) in other countries.[26] If this is typical, the total value of assets held in New Zealand trusts established for non-residents would come to trillions of dollars.[27]

In the short term, at least, New Zealand seems to have benefited from functioning as a tax haven. Most of the benefit went to the lawyers, accountants and others who have been providing these services, but they employed people, paid rent and consumed goods and services and so on. It seems clear, therefore, that the industry has benefited the economy generally. And it is only *other* countries' taxes that have been avoided and evaded, so this kind of tax avoidance cost the New Zealand government nothing. In fact the government *benefited* because the advisors providing the services paid tax on their incomes and Gods and Services Tax (GST) on their consumption. Moreover, if income is derived from outside New Zealand for the benefit of a person not resident in New Zealand, it might be said that as a matter of principle it should not be taxed in New Zealand. Further, it is not as if New Zealand was the only country operating as a tax haven in this way; there were and are plenty of others. If New Zealand ceases functioning as a tax haven (as it probably will, at least as regards this particular method of tax avoidance and evasion, now that the remedial legislation has been enacted), that will not reduce the amount of tax avoidance and evasion going on in the world. Rather, when New Zealand ceases offering this service, the tax avoiders and evaders will probably move to some more welcoming jurisdiction, such as Hong Kong.

On the other hand, the New Zealand government likes to portray itself as a responsible member of the international community. It even denied that New Zealand was a tax haven, though the denial was implausible given the possibility of arrangements such as

---

[22] Patterson above n 9; Tom Pullar-Strecker, "Can NZ's foreign trust industry survive Shewan's fix?" *Stuff* (online ed, 23 June 2016), http://www.stuff.co.nz/business/industries/81372690/Can-NZs-foreign-trust-industry-survive-Shewans-fix.

[23] According to STEP (the Society of Trust and Estate Practitioners), media reports have "grossly" underestimated the scale of the foreign trust industry: see STEP, "Submission to the Shewan Inquiry", 20 May 2016. The submissions made to the Inquiry have been made available to the public on the Inquiry's website: http://www.treasury.govt.nz/downloads/pdfs/fti-info/fti-3458926.pdf.

[24] "Number of foreign trusts plunges following tough new rules" Radio New Zealand, 5 July 2017 http://www.radionz.co.nz/news/business/334517/number-of-foreign-trusts-plunges-following-tough-new-rules; see also *Shewan Report* at [4.22]-[4.24] and figure 1.

[25] *Low Hock v Rothschild Trust (Schweiz) AG*, above n 5.

[26] At [3], [13] and [18].

[27] US$265 million is about NZ$370 million; NZ$370 million x 11,000 = NZ$4.07 trillion. See also *Shewan Report* at [7.12]–[7.16] and figure 4 (referring to a trust holding NZ$10 million in assets) and Fairfax Syndication, "The Panama Papers: Behind Mossack Fonseca's secret New Zealand deals" (6 May 2016) as reproduced in *Shewan Report*, above n 2, at 66 (suggesting that some trusts hold assets worth hundreds of millions of dollars).

those outlined above. In any event, it may be that the short-term gains made by the foreign trust industry were less than the medium-term losses resulting from the damage to the country's reputation. It might also be argued that the question is not simply a matter of direct self-interest and that it is wrong in principle for a country to allow itself to be used to undermine other countries' tax systems – and worse for it to have enacted legislation with that objective. Further, whilst there are plenty of other tax havens in the world, including among countries that are members of the OECD, it would seem that no other member of the OECD permitted this particular form of tax avoidance.[28] Therefore, now that New Zealand has tightened up its foreign trust regime, the tax avoiders and evaders, if they wish to continue to use offshore trusts to escape tax, will have to resort to some less reputable jurisdiction.

IV. THE RATIONALE FOR THE EXEMPTION

The fact that foreigners could use New Zealand as a tax haven was not due to a gap or loophole in the legislation. Rather, as indicated above, it was due to an exemption deliberately granted by Parliament. Why then, one might ask, did Parliament enact ss CW 54 and HC 26(1), and so grant this exemption? Why did it enact rules that would allow the country to be used as a tax haven? This is obviously an important question but in order to answer it, it is necessary to explain the territorial scope of the New Zealand tax system, the tax treatment of trusts, some basic tax avoidance techniques and the history of the legislation providing for the exemption.

Jurisdiction: Residence and Source

Like most tax systems, New Zealand's is based on the twin jurisdictional pillars of residence and source. The *residence* principle is that a person who is resident in New Zealand is obliged to pay New Zealand tax on his worldwide income, meaning both income derived from New Zealand and also income derived from anywhere outside New Zealand.[29] The *source* principle is that income derived from New Zealand is subject to New Zealand tax, even if the person by whom it is derived is non-resident.[30]

If a person resident in New Zealand derives income from outside New Zealand, he or she will typically be exposed, prima facie, to double tax, because the income will be taxable both in the country from which it is derived (the "source" country) and in New Zealand (the "home" country). Income derived from New Zealand by a person resident in some other country will likewise typically be exposed, prima facie, to double tax, because it will be taxable both in New Zealand (the source country) and also in the country in which the taxpayer resides (the home country). Usually such problems of double taxation are eliminated by one or other or both of the two countries involved

[28] It appears that no comprehensive account of the OECD countries' tax treatment of trusts set up by non-residents has been published, but the New Zealand approach seems, at least, to be radically different to that of other common law jurisdictions: Brabazon, n 18.

[29] Income Tax Act 2007, s BD 1(5). The legislation mitigates the effect of the residence principle by means of rules providing for "transitional" residence: see Income Tax Act 2007, ss CW 27, EW 41, HR 8 and RF 12. But these are generally irrelevant to the issues addressed in this paper.

[30] Income Tax Act 2007, s BD 1(5).

providing some form of relief,[31] but the income is nonetheless within the basic scope of both countries' tax systems.

The Basic Tax Treatment of Trusts

The basic problem in the tax treatment of trusts arises from the fact that the trustees might distribute a trust's income to the beneficiaries as they receive it, or they might accumulate the income with a view to distributing it to the beneficiaries at some later date. The solution provided for by New Zealand law (currently the Income Tax Act 2007) is that if the trustees distribute the trust's income to the beneficiaries as they (the trustees) receive it, then the beneficiaries are taxed on it; and if the trustees do not distribute the trust's income to the beneficiaries (in other words, if the trustees accumulate the income), then they, the trustees, are taxed on it.[32] The Act achieves this by distinguishing between "beneficiary income" and "trustee income".[33]

"Beneficiary income" is defined as meaning essentially income which is received by trustees and distributed by them to the beneficiaries during the year in which they (the trustees) received it, or within a further six months of the end of the year.[34] "Trustee income" is defined as meaning essentially income which is received by trustees and retained by them for at least that long – that is, for at least six months after the end of the year in which it is received by the trustees.[35] Thus whether income received by a trustee is beneficiary income or trustee income does not depend on the nature of the income (rents, dividends, business profits and so on). Rather, it depends on what the trustee does with the income after receiving it. If the trustee distributes the income to a beneficiary within the year in which he (the trustee) received it plus six months, it will at that point become beneficiary income; if the income remains undistributed six months after the end of the year, it will at that point become trustee income.

Beneficiary income is taxable in the hands of the beneficiary, at the beneficiary's rates of tax. That is, to the extent that the trustee distributes the trust's income to a beneficiary within the year in which he (the trustee) received it or within a further six months, the beneficiary is obliged to combine that income with whatever other income he or she has received from other sources and pay tax on the total.[36] Thus, depending on how much income (including beneficiary income) the beneficiary has received, the rate of tax applicable to his or her beneficiary income will be 10.5 per cent, 17.5 per cent, 30 per cent or 33 per cent (or 28 per cent if the beneficiary is a company, which is possible but unusual).[37] As an administrative matter, the tax on beneficiary income is collected from the trustee as agent of the beneficiary, rather than from the beneficiary directly.[38] But that is merely a withholding requirement – the income is regarded as the

[31] New Zealand is currently a party to 40 bilateral double tax treaties, and the number has been increasing at a rate of about one or two a year. These treaties all provide for relief from double taxation where a resident of one of the signatory countries derives income from the other. See generally Craig Elliffe, *International and Cross-Border Taxation in New Zealand* (Thomson Reuters, Wellington, 2015). In the absence of a treaty, unilateral relief is generally available; see Income Tax Act 2007, subpart LJ.

[32] Income Tax Act 2007, subpart HC.

[33] Income Tax Act 2007, subpart HC.

[34] Income Tax Act 2007, s HC 6.

[35] Income Tax Act 2007, s HC 7.

[36] Income Tax Act 2007, ss HC 17 and CV 13(a).

[37] Income Tax Act 2007, Schedule 1, Part A, cl 1.

[38] Income Tax Act 2007, s HC 32(3).

beneficiary's income, not the trustee's income; the amount of tax is calculated at the beneficiary's rate of tax; and if the trustee fails to pay, the beneficiary is liable.[39]

Trustee income, conversely, is taxable in the hands of the trustee at a flat rate, currently 33 per cent (irrespective of whether the trustee is a natural person or a company).[40] In other words, to the extent that the trustee retains the trust's income until the end of the year in which he receives it and for a further six months, he is obliged to pay tax on it at 33 per cent. The tax on trustee income is a final liability; if the trustee subsequently distributes such income to a beneficiary, no further tax is payable on it.[41]

Using Offshore Companies to Avoid New Zealand Tax

Prior to 1988, it was straightforward for New Zealanders to avoid tax on offshore income by accumulating it in an offshore company. If a New Zealand resident received offshore income directly, he or she was liable to pay tax on it – because New Zealand residents were (as they are still) obliged to pay New Zealand tax on their worldwide incomes. But if he incorporated a company in some other country (typically a tax haven) and arranged for the income to be received by the company, rather than by himself, the income was not subject to New Zealand tax, the reason being that (a) the income was derived from outside New Zealand (so it was not taxable on the basis of the source principle) and (b) the person by whom the income was derived (that is, the company) was not resident in New Zealand (so it was not taxable on the basis of the residence principle, either). If the company paid a dividend to a New Zealand-resident shareholder, the shareholder would generally be chargeable to New Zealand tax on it. But for that reason, the New Zealand-resident owners of the company would generally arrange for the company not to pay any dividends. Instead, they would get their hands on the money in some other way. For example, they might accumulate the income in the company and then sell the shares for a tax-free capital gain.

In 1988 Parliament enacted legislation designed to prevent this kind of abuse. The legislation contained rules referred to as the Controlled Foreign Company Rules (or CFC rules).[42] These rules are complex but their general effect is to impose tax where income is accumulated in a controlled foreign company, meaning a company controlled by five or fewer persons resident in New Zealand. The rules provide for the undistributed income of the company to be taxed as if it were the income of the shareholders. Thus, if the company pays a dividend, the shareholders are taxed on it under the general rule that persons resident in New Zealand are taxed on their worldwide incomes; and to the extent that the company does not pay dividends (that is, to the extent that it accumulates its profits), the shareholders are taxed under the CFC rules. Most OECD countries' tax legislation contains rules of this kind.

Also in 1988 Parliament enacted another set of rules referred to as the Foreign Investment Fund Rules (or FIF rules), which were designed to fill two gaps in the CFC rules.[43] First, the CFC rules apply only to *controlled* foreign companies – meaning generally companies controlled by five or fewer New Zealand-resident shareholders. They therefore left open the possibility that a New Zealand resident might avoid tax by

---

[39] Income Tax Act 2007, s HD 4.

[40] Income Tax Act 2007, s HC 24(1) and Schedule 1, Part A, cl 3.

[41] Income Tax Act 2007, ss HC 20 and CW 53.

[42] See, now, Income Tax Act 2007, subparts CQ, DN, EX, GB, IQ and LK.

[43] See, now, Income Tax Act 2007, s CD 36 and subparts CQ, DN, EX, GB and IQ.

accumulating offshore income in a company not so controlled (that is, a company with a more diverse shareholding, or controlled by shareholders not resident in New Zealand). Secondly, the CFC rules only apply to companies; they therefore left open the possibility that a New Zealand resident might avoid tax by accumulating offshore income in some entity other than a company (such as a superannuation fund). The FIF rules preclude those possibilities by taxing New Zealand residents on income accumulated in offshore funds whether incorporated or not and whether controlled by New Zealand residents or not. Again, most OECD countries' tax legislation contains rules of this kind. The FIF rules do not render the CFC rules redundant because, although their scope is broader, the method for calculating the amount of income attributed to the New Zealand-resident investor is different (for technical reasons not germane to this paper).

Using Foreign Trusts to Avoid New Zealand Tax

The CFC rules and the FIF rules made it impossible to escape New Zealand tax on offshore income by the simple expedient of accumulating it in an offshore company or fund. They did not, however, entirely resolve the problem because they left open the possibility that taxpayers would use trusts to achieve much the same result. Applying the basic "residence" and "source" rules (outlined above) to income received by trustees would produce the result that income derived by a trustee is subject to New Zealand tax where either (a) the trustee is resident in New Zealand or (b) the income is derived from New Zealand (even if the trustee is not resident in New Zealand).[44]

Prior to 1988, that is indeed the basis upon which the New Zealand tax system operated. That was unsatisfactory, however, because it left a large hole in the tax system. Some affluent New Zealand residents took advantage of this in the following manner.[45] First, the New Zealand resident established a trust by settling offshore assets on a non-resident trustee.[46] That could be achieved, for example, by the New Zealand-resident settlor transferring funds to the non-resident trustee. The trustee could then use the funds to acquire an income-producing asset located in a country other than New Zealand. For example the trustee could use the funds to buy land or securities or even simply leave the funds in an interest-bearing bank account. Alternatively, if the New Zealand-resident settlor already owned assets outside New Zealand, he could transfer them to the trust.

The trustee would then receive whatever income the assets produced. The income was not taxable in New Zealand because (a) the trustee was not resident in New Zealand and (b) the income was not derived from New Zealand. If the trustee distributed the income to a New Zealand-resident beneficiary as beneficiary income (that is, within the year in which the trustee received it or a further six months), then the income would be subject to New Zealand tax. That is, the beneficiary would be obliged to pay New Zealand tax on it. But if the trustee retained the income until the end of the year in

---

[44] It is of course common for trusts to have more than one trustee; and it is also possible, therefore, for one or more of the trustees to be resident in New Zealand and one or more of them to be resident elsewhere. The tax consequences of this are unclear. See Pavlovich, n 18 and Brabazon, n 18.

[45] *Shewan Report* at [4.12]-[4.14].

[46] Gifts of more than NZ$27,000 per year were subject to gift duty until 2011, when gift duty was effectively abolished: Estate and Gift Duties Act 1968, s 61, as amended. Transfers of assets to trusts were therefore generally effected by means of a sale at market value (the price remaining unpaid), followed by a series of gifts, forgiving the debt, at NZ$27,000 per year.

which he received it and for a further six months and *then* distributed it to a New Zealand-resident beneficiary, it would not be subject to New Zealand tax at all. It would not be subject to New Zealand tax as trustee income (because, although it was possible to classify it as trustee income, it was derived from outside New Zealand; and the trustee was not resident in New Zealand); and it would not be subject to New Zealand tax as beneficiary income either (it was not beneficiary income because it was not distributed to the beneficiary within the requisite year and six months).

The "Resident-Settlor" Rule

Prior to 1988 it was possible to avoid New Zealand tax in this way (that is, by using an offshore trust), but it seems not to have been common. The reason was that it was simpler to use an offshore company (as explained above) rather than a trust. But the enactment of the CFC rules and the FIF rules in 1988 largely precluded the use of offshore companies as a tax avoidance device. It was easily foreseeable, then, that the use of offshore trusts would proliferate, unless specifically legislated against.

Together with the CFC rules and the FIF rules, Parliament therefore introduced what is called the "resident-settlor" rule, which is as follows: if the *settlor* of a trust is resident in New Zealand, then all the trustee income is subject to New Zealand tax – even if the trustees are not resident in New Zealand and even if the income is derived from outside New Zealand.[47] This is currently provided for by s HC 25 of the Income Tax Act 2007, which applies where (a) the settlor of a trust is a New Zealand resident;[48] and (b) the trustees are non-residents;[49] and (c) the trustees derive income from outside New Zealand.[50] In such circumstances, the income is assessable to New Zealand tax in the hands of the trustees.[51] Moreover, not only are the trustees liable to pay tax on the income but so, too, is the settlor. As the Act puts it, in these circumstances "the settlor is liable as agent of the trustee for income tax payable by the trustee."[52] Generally it might be that the trustees will pay the tax; but it is necessary for the Revenue to be able to collect it from the settlor, since in the circumstances in which the rule applies it is likely to be impossible to collect it from the trustees if they fail to pay (because the trustees will be non-resident and own no assets in New Zealand).[53]

The word "settlor" is widely defined, covering any person who "transfers value" to a trust.[54] The usual means of settling property on trustees is simply to give it to them (or to sell it to them and then forgive the debt), but the definition of "settlor" is much wider than that. For example, it covers where a person sells property to a trust at less than market value; where a person buys property from a trust at more than market value; where a person lends money to a trust at a rate of interest below the market rate or without charging interest at all; and so on. The Act provides also that a person is a settlor of a trust if he or she *indirectly* transfers value to it – for example, by transferring property to a third party who in turn transfers it to the trust.[55] The reason for defining "settlor" so broadly is that if it were possible to transfer value to a trust without

---

[47] Income Tax Act 2007, s HC 25.
[48] Income Tax Act 2007, s HC 25(2)(a).
[49] Income Tax Act 2007, s HC 25(1).
[50] Income Tax Act 2007, s HC 25(1).
[51] Income Tax Act 2007, s HC 25(2).
[52] Income Tax Act 2007, s HC 29(2).
[53] For a critique of this approach, see Brabazon, n 18.
[54] Income Tax Act 2007, s HC 27(2).
[55] Income Tax Act 2007, s HC 28.

constituting oneself a settlor, it would be possible to escape the "resident settlor" rule and thus avoid tax.

The resident-settlor rule is an effective mechanism, generally preventing New Zealand residents from using trusts set up in other countries to avoid New Zealand tax.

The Exemption

At the same time as enacting the resident-settlor rule, Parliament enacted the exemption now provided for by ss CW 54 and HC 26(1) – the general scope of which is explained above. The exemption only applies to offshore income; income derived from New Zealand is assessable to tax in the hands of the trustees, in accordance with the source principle. Also, the exemption only applies to trustees; it does not apply to beneficiaries. Thus, if a non-resident settles property on a trustee resident in New Zealand, the income derived from outside New Zealand is not taxable in the hands of the trustee; but if the trustee distributes the income to a beneficiary resident in New Zealand, it will be assessable in the hands of the beneficiary. If the trustee distributes the income during the year in which he receives it or within a further six months, it will be taxable as beneficiary income (at the beneficiary's marginal rate); if he distributes it after that period, it will be taxable as a "taxable distribution" (again at the beneficiary's marginal rate).[56]

Why Parliament enacted this exemption is unclear. It would seem, however, that the rationale is several-fold. First, it might be said that it is appropriate for New Zealand (in accordance with the residence principle) to tax persons resident within the jurisdiction on their worldwide incomes; and also (in accordance with the source principle) to tax income derived from New Zealand, even where the person deriving it is not resident; but that it would be inappropriate for New Zealand to tax income derived from outside New Zealand for the benefit of persons not resident in New Zealand. In other words, it might be said that as a matter of policy there is no reason to tax New Zealand-resident trustees on income derived from outside New Zealand for the benefit of non-resident beneficiaries.[57] Professor Prebble has explained the theory as follows:[58]

> The basis of the New Zealand policy is this. We say that if a foreigner is sufficiently confident in the New Zealand trust industry that he will give his property and the income from it to the trustee to look after, why would New Zealand tax that income, assuming there is no other connection with New Zealand? There is no more reason to tax that income than if the foreigner decided to use a New Zealand bank, for instance, to collect interest that emanated from another jurisdiction.

Secondly, it might be said also that it would be futile for New Zealand to attempt to tax income derived by a New Zealand-resident trustee from outside New Zealand for the benefit of a non-resident beneficiary, because the settlor could easily escape the liability by arranging for the trust property to be held by a trustee resident elsewhere. Therefore, the exemption costs the New Zealand government nothing.

---

[56] Income Tax Act 2007, ss HC 18 and CV 13(c).

[57] See *Shewan Report* at [4.10]-[4.18]; Beckham and Elliffe, n 18.

[58] John Prebble, "Trusts and Tax Treaties" (2008) 8 Journal of the International Tax Planning Association 75 at 75.

But whatever Parliament's reasons for enacting it, it was this exemption (coupled with the weak disclosure requirements, discussed below) that made possible the kind of tax avoidance and evasion with which this paper is concerned. To return to the example with which the paper began, it is this exemption that made it possible for the resident of Portugal to settle his forest in Indonesia on a New Zealand-resident trustee and so escape the tax he would otherwise have had to pay in Portugal on the income derived from the forest. In other words, it was this exemption that made it possible for persons resident in other countries to use New Zealand as a tax haven.

As indicated above, tax avoidance of this kind cost the New Zealand government nothing – the reason being that it was foreign tax (for example, Portuguese tax), not New Zealand tax, that was being avoided or evaded. Indeed, the New Zealand government *gained*, in the short term, at least, by allowing the country to be used as a tax haven because the firms setting up and administering trusts for foreign clients charged fees (so the New Zealand economy benefited) and paid tax (so the government benefited).

It is obvious that the exemption provided for by ss CW 54 and HC 26(1) permitted persons resident in other countries to use New Zealand as a tax haven; and it is obvious that New Zealand benefited from providing this service (leaving aside the harm that might have resulted from the country's being stigmatised as a tax haven). It seems likely, then, that the exemption was enacted with that in mind. That is, it seems likely that the government's aim, when it procured the enactment of the rules now provided for by ss CW 54 and HC 26, was in effect to promote the use of the country as a tax haven. It is perhaps worth noting in this connection the Prime Minister's suggestion that New Zealand should aim to be the "Switzerland of the South Pacific" (though it was not his government that enacted ss CW 54 and HC 26).[59] It is also conceivable that the New Zealand Parliament's enactment of a law effectively enabling the country to profit by allowing itself be used as a tax haven was inadvertent – though it seems unlikely. Shewan's assessment is that, "[I]t seems unlikely that policy makers predicted the size of the New Zealand foreign trust industry that would emerge" from the granting of the exemption[60] – though he does not explain why he thought it unlikely, nor what he thought the government was attempting to achieve by granting it. But whether it was deliberate or inadvertent, other countries' governments are likely to regard it as unsatisfactory for New Zealand to allow itself to be used to undermine their tax systems.

V. THE DISCLOSURE REQUIREMENTS

Although a New Zealand-resident trustee was not obliged to pay New Zealand tax on income derived from outside New Zealand, it *was* obliged to supply certain specified information to the IRD. Prior to the recent amendments, the disclosure requirements were set out in s 59B(1)(a) of the Tax Administration Act 1994, which provided as follows (emphasis added):

---

[59] Isaac Davison, "Panama Papers: Key defends offshore banking comments" *New Zealand Herald* (online ed, Auckland, 6 April 2016); Pattrick Smellie, "Key faces sustained questioning on NZ presence in 'Panama Papers'" *National Business Review* (New Zealand, online ed, 4 April 2016).

[60] *Shewan Report* at [4.18].

> A resident foreign trustee for a foreign trust must disclose to the Commissioner the following particulars for the foreign trust…*the name or other identifying particulars* (for example, the date of the settlement on the trust) *that relate to the foreign trust*.

This was so badly drafted that one has to wonder whether it was deliberate. For example, the settlor might have been called John Smith; he might have arranged for the establishment of a trust as described above; and he might have called his trust "the Abracadabra Trust". So the trustee (Abracadabra Ltd) had to disclose to the IRD that it was the trustee of a trust called the Abracadabra Trust, and that was all.

This was almost completely useless. In particular, the trustee was generally *not* required to supply any information at all as to:

1. the name of the settlor;
2. the country of residence of the settlor;
3. the names of the beneficiaries;
4. the country of residence of the beneficiaries;
5. the nature of the assets held by the trust;
6. the country in which the assets were situated;
7. the value of the assets;
8. the amount of income derived from the assets; or
9. to whom, if anyone, the income was distributed.

What this meant was that there was no exchange of information. New Zealand is a party to a complex network of treaties under which the IRD exchanges tax-related information with other countries' tax departments.[61] But in this case the Department had no information as to who the settlor was, or that he was resident in Portugal, so it was not able to inform the Portuguese revenue authorities that a resident of Portugal had set up a trust in New Zealand.[62] The Portuguese authorities were unlikely to ask, because they were unlikely to know that a Portuguese resident had set up a trust in another jurisdiction; and even if they knew that, they were unlikely to know that that jurisdiction was New Zealand; and even if they knew *that*, they were unlikely to know that it was called the Abracadabra Trust.[63]

It is important to note also that the disclosure requirement was generally a one-off obligation: once the trustee had made its initial disclosure to the IRD, there was no requirement for annual reporting or any other subsequent reporting (other than that, if

---

[61] See Elliffe, n 31; AJ Sawyer "Peer Review of Tax Information Exchange Agreements: Is it More Than Just About the Numbers?" (2011) 26 Australian Tax Forum 397.

[62] As indicated above at n 19, Jose Mourinho's trust is called the Kaitaia Trust. Whether the IRD knew, prior to the recent news reports, that Mourinho was behind it is a question the answer to which is not in the public domain.

[63] See *Shewan Report* at [6.17]. Despite these limitations, the IRD supplied information about foreign trusts to other governments on 142 occasions in the period from 2010 to 2016. It appears that the Department generally obtained the information as a consequence of auditing the firms supplying services to the foreign trusts. See *Shewan Report* at [6.11] and [6.14]. See also IRD "New Disclosure and Record-Keeping Rules for Foreign Trusts" (2006) 18(5) Tax Information Bulletin 107.

the trust changed its name, it was obliged to inform the IRD).[64] Foreign trusts seldom if ever derive income from New Zealand; and, as explained above, they are exempt from New Zealand tax on income derived from outside New Zealand. They are therefore seldom, if ever, obliged to file a New Zealand tax return.[65]

If the settlor was resident in Australia, a more stringent rule applied. This appears to have been enacted at the request of the Australian government, which was concerned that a significant number of Australians were using trusts set up in New Zealand to escape Australian tax.[66] The rule was that if the settlor of the trust was resident in Australia, the trustee was obliged to inform the Department of that fact.[67] It would appear that the IRD's practice, where a person disclosed that he was a trustee of a trust settled by a person resident in Australia, was in turn to supply that information to the Australian Tax Office (the ATO). It appears, too, that the IRD did that spontaneously – that is, without waiting for the ATO to ask for it.[68] Even so, it is notable that the information supplied to the ATO was a long way short of what the ATO might find useful. Obviously the IRD was only able to supply to the ATO the information that the trustee had supplied to the IRD; and all the trustee was obliged to supply to the IRD was (a) "the name or other identifying particulars" of the trust and (b) the fact that the settlor was an Australian resident.[69] As indicated above, the trustee was not obliged to supply the IRD with any information at all as to the settlor (other than the fact that he or she was a resident of Australia), the beneficiaries, the assets, the income or the distributions. Presumably, if the ATO was interested in whatever information it received from the IRD, it asked for further information about the settlor, the beneficiaries and the trust's finances, and presumably the IRD then went out and obtained the information and relayed it to the ATO.

It appears, interestingly, that virtually all of the Australian residents who had set up trusts in New Zealand responded to the enactment of this rule by either winding up their trusts or shifting them to some more accommodating jurisdiction; and that "virtually no" Australians have subsequently set up trusts in New Zealand.[70] It seems reasonable to infer, therefore, that almost all the Australians who had set up trusts in New Zealand were using them for some purpose that depended on the Australian government not finding out about them.

VI. RECORD-KEEPING

Although the disclosure requirements were inadequate (for the reasons given above), the Tax Administration Act also imposes record-keeping obligations on any person who is (a) resident in New Zealand and (b) a trustee of a trust established by a non-resident. Specifically, s 22 of the Tax Administration Act provides, among other things, that:[71]

---

[64] Tax Administration Act 1994, s 59B(2).
[65] But see Brabazon, n 18 at 363.
[66] Simcock, n 18, at 31; *Shewan Report* at [4.20]; IRD "Draft Note to Minister of Revenue" April 2016; IRD, n 63.
[67] Tax Administration Act 1994, s 59B(1)(c).
[68] *Shewan Report* at [6.8].
[69] Tax Administration Act 1994, s 59B.
[70] *Shewan Report* at [4.23].
[71] Tax Administration Act, s 22(2)(fb) and (m). See also s 2, definition of "resident foreign trustee". The term "foreign trust" is not defined in the Tax Administration Act. It is defined in the Income

> [E]very person…who…is a resident foreign trustee of a foreign trust…shall keep sufficient records to enable the ascertainment readily by the Commissioner, or any officer authorised by the Commissioner in that behalf, of…the financial position of the foreign trust and shall retain all such records for a period of at least 7 years….

The section also provides that the records to be kept by the trustee must include the following:[72]

(i) documents that evidence the creation and constitution of the foreign trust; and

(ii) particulars of settlements made on, and distributions made by, the foreign trust, including the date of the settlement or distribution, the name and address (if known) of the settlor of the settlement, the name and address (if known) of the recipient of the distribution; and

(iii) a record of—

(A) the assets and liabilities of the foreign trust; and

(B) all entries from day to day of all sums of money received and expended by the trustee in relation to the foreign trust and the matters in respect of which the receipt and expenditure takes place; and

(C) if the trust carries on a business, the charts and codes of accounts, the accounting instruction manuals, and the system and programme documentation which describes the accounting system used in each income year in the administration of the trust[.]

These requirements are quite stringent and appear to cover most of what a foreign tax authority would like to see (leaving aside the curious wording of paragraph (ii), which appears to envisage that the trustee might distribute trust monies to a beneficiary without knowing where he or she lives; and that the trustee might not know where the settlor lives). Moreover, the general powers of the Commissioner of Inland Revenue (the Commissioner) are ample to enable her to inspect the records kept by the trustee, to copy them, and, at least where there is a treaty permitting it, to supply to foreign tax authorities the information obtained.[73] Thus, the Tax Administration Act required resident trustees of foreign trusts to keep more or less adequate records of the trust's affairs; but it did not require them to disclose any meaningful information at all to the Commissioner, unless the Commissioner asked for it.

It would perhaps have been possible for the IRD to audit all 11,750 of the existing foreign trusts. That would have enabled it to supply the relevant information to whatever foreign governments it thought might be interested (assuming there to have been a treaty allowing it to do so). It is not clear, however, that that would have been lawful. Moreover, it would seem undesirable for the IRD to have been required to devote a substantial part of its resources to auditing entities that, no matter what

---

Tax Act 2007 as meaning generally any trust in respect of which the settlor is not resident in New Zealand: Income Tax Act 2007, ss YA 1 and HC 11. Presumably Parliament intended this definition to apply not only to the Income Tax Act but also to the Tax Administration Act, though the drafting is not as clear in this respect as would have been desirable. See in particular the opening words of s YA 1 ("In this Act unless the context requires otherwise….").

[72] Tax Administration Act 1994, s 22(7)(d). See also s 22(2C).

[73] Tax Administration Act 1994, Part 3; Sawyer, n 61.

happened, were not going to be liable for tax *in New Zealand*. That is, such audits could only ever have benefited *other* governments.

VII. THE PANAMA PAPERS

In 2014 an anonymous whistle-blower who referred to himself as John Doe supplied about 11.5 million documents, referred to as the Panama Papers, to a journalist working for a German newspaper called Süddeutsche Zeitung. The documents belonged to a Panamanian law firm called Mossack Fonseca and its clients and they dealt with the arrangements used by these clients to conceal funds in countries other than where they were living. How Doe got hold of the documents remains unknown, as does his identity. The German newspaper shared the documents with a number of other journalists associated with a group called the International Consortium of Investigative Journalists (the ICIJ). These journalists spent a year or so analysing the documents, and in April 2016 the various media organisations with which they were associated published a more or less coordinated series of stories about them.[74] The ICIJ described the Panama Papers as follows:[75]

> The Panama Papers is an unprecedented investigation that reveals the offshore links of some of the globe's most prominent figures.
>
> The International Consortium of Investigative Journalists, together with the German newspaper Suddeutsche Zeitung and more than 100 other media partners, spent a year sifting through 11.5 million leaked files to expose the offshore holdings of world political leaders, links to global scandals, and details of the hidden financial dealings of fraudsters, drug traffickers, billionaires, celebrities, sports stars and more.
>
> The trove of documents is likely the biggest leak of inside information in history. It includes nearly 40 years of data from a little-known but powerful law firm based in Panama. That firm, Mossack Fonseca, has offices in more than 35 locations around the globe, and is one of the world's top creators of shell companies, corporate structures that can be used to hide ownership of assets.
>
> ICIJ's analysis of the leaked records revealed information on more than 214,000 offshore companies connected to people in more than 200 countries and territories.
>
> The data includes emails, financial spreadsheets, passports and corporate records revealing the secret owners of bank accounts and companies in 21 offshore jurisdictions, including Nevada, Hong Kong and the British Virgin Islands.

The stories published by the New Zealand media drew attention to the fact that it was possible for people from other countries to use New Zealand as a tax haven.[76] In particular, it was reported that a wealthy Mexican (Juan Armando Hinojosa) and a

---

[74] See for example Garside and others, n 2; Davison, n 3; Hunter, n 3; see also *Shewan Report* at Part 3 and Appendix 2.

[75] ICIJ, "The Panama Papers: About this Project" https://panamapapers.icij.org/about.html (3 April 2016).

[76] Gyles Beckford, "Is NZ a tax haven or a safe haven?" (13 April 2016) Radio New Zealand, http://www.radionz.co.nz/news/business/301404/is-nz-a-tax-haven-or-a-safe-haven.

Maltese politician (Konrad Mizzi) had both settled assets on New Zealand-resident trustees.[77]

VIII. THE SHEWAN REPORT

As indicated above, the government initially denied that the foreign trust rules were in any way unsatisfactory.[78] A week later, however, the government changed course: on 11 April 2016 it announced that it would establish a formal inquiry under s 6(3) of the Inquiries Act 2013,[79] and on 19 April 2016 it appointed a distinguished Wellington accountant, John Shewan, to conduct the inquiry.[80]

Shewan submitted his report to the government on 20 June 2016. The terms of reference given him by the government were complex,[81] but he summarised them as follows:[82]

> The Inquiry is required to examine New Zealand's foreign trust disclosure rules and to report on whether the rules, and the enforcement of them, are sufficient to ensure New Zealand's reputation is maintained when considered alongside the country's commitment to various OECD and other international agreements. In short, are the rules fit for purpose?

Shewan's Recommendations

Shewan's conclusion was that the rules were "inadequate" and that reform was therefore required.[83] He advised that the publicity surrounding the Panama Papers had "the potential to cause reputational damage both to New Zealand and to many other countries", but that "significant adverse impact on New Zealand" was "unlikely if appropriate action is taken to tighten the disclosure rules".[84] The crux of the matter he put as follows:[85]

> [O]ffshore parties might justifiably conclude that New Zealand has light-handed disclosure requirements and is a very easy place to set up in without any material likelihood of information being requested by a New Zealand government agency and provided to a tax or other authority offshore.

And:[86]

> New Zealand should not be or be seen as a country that effectively facilitates evasion through having disclosure and reporting requirements that are

[77] Hamish Fletcher, "Panama Papers: Leak leaves stain on New Zealand's name", *New Zealand Herald* (online ed, Auckland, 9 April 2016).
[78] John Key (5 April 2016) 712 NZPD 10139.
[79] Bill English (Minister of Finance) and Michael Woodhouse (Minister of Revenue), "Review of foreign trust disclosure rules", Media Statement, 11 April 2016, https://www.beehive.govt.nz/release/review-foreign-trust-disclosure-rules.
[80] "Establishment of the Government Inquiry into Foreign Trust Disclosure Rules" (19 April 2016) 33 *New Zealand Gazette* 1.
[81] *Shewan Report* at [2.6] and Appendix 1.
[82] At [1.1].
[83] At [1.2]-[1.3].
[84] At [1.7].
[85] At [10.5].
[86] At [4.34]. See also *Shewan Report* at [9.22] and [10.5].

> sufficiently weak to cause offshore parties to conclude that detection is highly improbable.

And:[87]

> The foreign trust regime does not appear to be inconsistent with any specific obligations under current international agreements to which New Zealand is a signatory. However, as there is a reasonable likelihood that the regime is facilitating the hiding of funds or evasion of tax in some instances, the Inquiry considers that New Zealand's international treaty partners would have a legitimate expectation that some action will be taken. There is clear potential for reputational damage in the eyes of some countries if no action is taken.

Specifically, Shewan recommended, first, that the IRD should maintain a register of foreign trusts and that foreign trusts should be required to register.[88] Strictly speaking, this was new, in that the law did not *require* the IRD to maintain a register of foreign trusts. In practice, although the IRD was not legally obliged to maintain a register of foreign trusts, it already in fact did so. That is, the IRD had informally set up such a register, even though it was not legally obliged to do so.[89] Thus, now that this recommendation has been implemented, the Department is legally obliged to do what it was doing anyway.[90] Moreover, given that Shewan also recommended beefing up the disclosure requirements (as discussed below), the register will contain much more useful information than at present.

The register is currently private and Shewan recommended that it should remain so.[91] That is, no one apart from the IRD and other authorised persons will be allowed to look at it. This seems obviously sensible. Shewan also recommended, however, that the classes of authorised persons should be extended to include other "regulatory agencies", specifically the Police and the Department of Internal Affairs (the DIA).[92] His rationale for this was that the Police and the DIA are both charged with various functions in connection with combating money-laundering and the financing of terrorism; and access to the register maintained by the IRD will obviously assist them in performing those functions. This recommendation, too, then, was obviously sensible.

Shewan recommended also that fees should be charged: NZ$500 on the initial registration of a foreign trust and NZ$500 per year after that.[93] Again, this was obviously sensible: foreigners using New Zealand as a place to set up a trust should reimburse the government for the costs it incurs in regulating them, especially since they will seldom if ever be required to pay any New Zealand tax.

Secondly, Shewan recommended that the disclosure requirements should be strengthened. Specifically, he recommended that the New Zealand-resident trustee of a foreign trust should be required to file the trust deed with the IRD at the time of

---

[87] At [8.31].
[88] At [12.1]-[12.6].
[89] At [5.6].
[90] Tax Administration Act 1994, ss 59B–59E, as amended and added by Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, s 11.
[91] *Shewan Report* at [13.1]-[13.8].
[92] At [12.2] and [12.20].
[93] At [12.14].

registration[94] and also to supply "the name, email address, foreign residential address, country of tax residence and Tax Identification Number" of each of the following:

1. "the settlor or settlors"; and
2. "the protector (if there is any)"; and
3. any "non-resident trustees"; and
4. "any other natural person who has effective control of the trust (including through a chain of control or ownership)"; and
5. the "beneficiaries of fixed trusts, including the underlying beneficiary where a named beneficiary is a nominee".[95]

He pointed out that, in the case of a discretionary trust, it might be "impracticable" to identify all the potential beneficiaries in advance; and he accordingly advised that at the time of registration "each class of beneficiary" should be "described in sufficient detail to enable identity to be established at the time of a distribution".[96] To this it might be added that, whilst Shewan is correct that it is sometimes difficult or impossible to identify in advance all the beneficiaries of a discretionary trust, it is commonly possible to identify in advance at least some of them; and that, where that is so, the trustee should be required to supply the relevant information.

Shewan advised also that foreign trusts should be required to file with the IRD an annual return including:

1. "any changes to the information provided at registration"; and
2. "the trust's annual financial statements"; and
3. "the amount of any distributions paid or credited and the names, foreign address, Tax Identification Number and country of tax residence of the recipient beneficiaries".[97]

Shewan's rationale was that if the disclosure requirements were to be extended as he recommended, the information obtained by the Department would be useful (which, under the law as it stood, was not the case); and the Department could supply it to whichever governments it thought might be interested (assuming the requisite treaty arrangements to be in place). Extending the rules in this way would impose an increased compliance burden on foreign trusts but the increase would be trivial because the trustee would already be in possession of the relevant information (assuming it to be in compliance with the record-keeping requirements outlined above). Also, it seems likely that non-residents would go to the trouble and expense of setting up a trust in New Zealand only where the value of the assets was considerable,[98] so the burden of compliance would be easily tolerable.

Thirdly, Shewan recommended that every person establishing a foreign trust should be required to submit, at the time of applying for registration of the trust, a declaration that every settlor and trustee had been advised of and agreed to comply with their obligations in respect of record-keeping, the Anti-Money Laundering and Countering

[94] At [12.9].
[95] At [12.7].
[96] At [12.8].
[97] At [12.11].
[98] See text above at nn 25 to 27.

Financing of Terrorism Act 2009 and the regulations made under it, and the Standard for Automatic Exchange of Financial Account Information (colloquially referred to as the Common Reporting Standard or CRS) developed by the OECD in connection with the Convention on Mutual Administrative Assistance in Tax Matters.[99] Fourthly, in respect of all his recommendations, Shewan proposed that there should be transitional rules for foreign trusts already established.[100]

Finally, Shewan proposed an ingeniously elegant method of enforcing compliance. His suggestion was that whilst foreign trusts should *generally* remain exempt from New Zealand tax, the exemption should be lost if the trustee fails to comply with the disclosure requirements.[101] This would seem likely to prove highly effective.

Shewan's recommendations were all obviously sensible. They were, indeed, virtually the same as those advanced by the author as early as March 2015.[102] It is notable, too, that several of the firms making submissions to the Shewan Inquiry – for example, KPMG and PWC – also called for a beefing up of the disclosure requirements.[103] That firms such as these should have taken such a stance is highly commendable and indicative of the helpful manner in which private-sector actors have often contributed to the reform of tax law in New Zealand.[104] It is also in marked contrast to the confrontational approach taken by firms and the revenue authority in some other countries.

Other Options Considered

Shewan considered also a number of other possibilities.[105] First, it would of course have been possible for him to recommend that no change was required. Having concluded that the existing disclosure rules were inadequate,[106] however, he naturally dismissed that possibility.

Secondly, he considered the possibility of strengthening the disclosure rules, but to a lesser extent than he ultimately recommended. Specifically, he considered recommending that the trustee of a foreign trust be required to disclose the identity of the settlor and the beneficiaries, but not the financial affairs of the trust. This, too, however, he rejected.[107] Here, again, his analysis was completely sound. The financial affairs of a trust are obviously likely to be of interest to the revenue authorities of the countries concerned, and there is no reason for not requiring the trustee to disclose

---

[99] *Shewan Report* at [12.3]. See generally Sawyer n 16.
[100] At [12.5].
[101] At [12.10]. Shewan also made a number of recommendations relating to the anti-money-laundering rules and to the reporting of suspicious transactions, but these are beyond the scope of this paper.
[102] See Littlewood above n 19.
[103] See the submissions of KPMG, PWC and Chartered Accountants Australia New Zealand: http://www.treasury.govt.nz/publications/reviews-consultation/foreign-trust-disclosure-rules.
[104] See Struan Little, Geof D Nightingale, and Ainslie Fenwick, "Development of Tax Policy in New Zealand: The Generic Tax Policy Process" (2013) 61 Canadian Tax Journal 1043; A Sawyer, "Establishing a Rigorous Framework for Tax Policy Development: Can New Zealand Offer Instructional Guidance for Hong Kong?" (2013) 43 Hong Kong Law Journal 579; Adrian Sawyer, "Reviewing tax policy development in New Zealand: lessons from a delicate balancing of 'law and politics'" (2013) 28 Australian Tax Forum 401; Peter Vial, "The Generic Tax Policy Process: A 'Jewel in our Policy Formation Crown'?" (2012) 25 NZULR 318.
[105] *Shewan Report* at [10.9] and Part 13.
[106] At [1.2].
[107] At iv.

them. Moreover, it seems likely that any foreign government, informed by the IRD that one of its residents had established a trust in New Zealand, would ask the IRD for the trust's financial statements; and that the IRD would then obtain them from the taxpayer and supply them to the foreign government. Since the foreign government would thus obtain the financial statements in any event, it would seem simpler to require the trust to make them available without waiting to be asked.

Thirdly, Shewan considered the possibility of dealing with the problem by repealing ss CW 54 and HC 26(1) and thus withdrawing the tax exemption provided for by those sections.[108] That is, a New Zealand-resident trustee of a foreign trust would be required to pay New Zealand tax on its income, in accordance with the general principle that persons resident in New Zealand are obliged to pay tax on their income (including offshore income). That would have solved the problem; foreign trusts and the industry that has grown up of setting them up and servicing them would probably have disappeared overnight. Shewan rejected this course, however, essentially on the ground that it was a more drastic measure than was required or appropriate. The reason is that it is possible that some of the foreign trusts set up in New Zealand are being used for entirely legitimate purposes, as Shewan explained:[109]

> Foreign trusts, like domestic trusts, are a legitimate vehicle used primarily to manage family wealth. New Zealand is an attractive location in which to base a foreign trust as it offers stable political, judicial and legislative settings and respect for property rights and privacy. The supporting services industry is significant, and generally comprises skilled and efficient professionals.

There is no reason in principle, the argument goes, to tax foreign trusts (if they are being used for legitimate purposes), for why should New Zealand seek to tax income derived from outside New Zealand for the benefit of persons not resident in New Zealand? If they were taxed, they would leave; and their departure would destroy the industry (also legitimate) that has grown up of setting them up and serving them, with consequent unnecessary damage to the New Zealand economy and the government's revenues. In a nutshell, beefing up the disclosure rules will probably solve the problem (illicit use of trusts), without harming the legitimate industry – whereas withdrawing the exemption would achieve no more than beefing up the disclosure rules, but also destroy the legitimate industry.[110] Moreover, although taxing the trustee would solve the problem, it would not produce any revenue, because all the trusts exposed to such a liability would almost certainly shift to some jurisdiction that did not tax them (Hong Kong, for example). Further, withdrawing the exemption would not reduce the amount of tax avoidance and evasion going on in the world, because, again, the avoiders and evaders would simply move to some other jurisdiction.

Against this, it might be argued that few of these trusts, or even none, are serving any legitimate purpose; that the sounder course would be to close down the foreign trust industry; that the best way of doing that would be to withdraw the exemption (whilst also beefing up the disclosure requirements); and that in any event there is no reason to allow foreigners to set up trusts in New Zealand without paying any tax. Whether the exemption should be retained is, therefore, debatable. It would accordingly be

---

[108] At [13.25]-[13.28].
[109] At [1.8].
[110] At [13.25]-[13.28].

appropriate for the government to monitor the use that is made of it, with a view to assessing its continued desirability.

Fourthly, some of those who made submissions to Shewan's Inquiry proposed that the law should be changed so that a person could act as a trustee of a foreign trust only if licensed to do so, but he rejected this idea on the grounds that it would unjustifiably add to the cost of administration and compliance and impair competition.[111] This, too, was probably sound – whatever the problems presented by an unregulated industry, tougher disclosure rules will probably solve them.

Finally, some commentators proposed that foreign trusts should be not merely more tightly regulated, but banned. This proposal seems, however, not to have been thought through. It is not clear how it could be achieved, nor what the consequences would be. In particular, if foreign trusts were to be somehow banned, what would happen to their assets? A law banning foreign trusts would presumably have to provide for title to their assets to vest absolutely in the beneficiaries or revert to the settlor – and the consequences of such a law would seem troublesome, to say the least. In this connection it is necessary to note that it might occasionally happen that a foreign trust comes into being inadvertently. For instance, this might happen if a foreigner who happens to be a trustee migrates to New Zealand. For New Zealand law to interfere with the relationships between the trustee and the beneficiaries in such a case would seem to be plainly inappropriate. Shewan very sensibly therefore rejected this suggestion.[112]

IX. THE GOVERNMENT'S RESPONSE

As indicated above, the government accepted virtually all of Shewan's recommendations and the amending legislation was enacted on 21 February 2017.[113] As recommended by Shewan, the Commissioner is now required to maintain a register of foreign trusts, and New Zealand-resident trustees of foreign trusts are required to register.[114] They are obliged to supply to the Commissioner information of the kinds proposed by Shewan, a signed declaration as to the matters proposed by Shewan, and details of any changes.[115] There are also, as proposed by Shewan, transitional rules for foreign trusts already established.[116]

The government has, however, toned down one of Shewan's recommendations. Shewan proposed that the registration fee should be an initial NZ$500 plus NZ$500 per year after that. The legislation, however, provides for only an initial fee of NZ$270 and an annual fee of NZ$50.[117] It seems unlikely that this will even cover the IRD's costs

---

[111] At [13.9]-[13.17].

[112] At [1.3], [1.37], [4.1], [4.4], [10.1] and [13.25].

[113] Bill English (Minister of Finance) and Michael Woodhouse (Minister of Revenue), "Government to adopt Shewan Recommendations" Media Statement, 13 July 2016; Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017.

[114] Tax Administration Act 1994, s 59B(1) and (2), as amended by Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, s 11.

[115] Tax Administration Act 1994, s 59B(3), (4) and (5), as amended by Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, s 11.

[116] Tax Administration Act 1994, sc 59B and 59C, as amended and added by Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, s 11.

[117] Tax Administration Act 1994, s 59E, as added by Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, s 11.

in maintaining the register; and even less likely that it will cover the costs incurred by the IRD when (as seems probable) it shares information with other countries' tax departments. But perhaps the government has calculated that, although the foreign trusts themselves will not pay any tax, the firms setting them up and administering them will; and that on this basis the industry might pay its own way.

After gazetting the Bill, the government received a number of submissions on it.[118] These were notable for their virtually unanimous acceptance – even among the firms whose business includes setting up and running trusts for non-residents – of the principle that tougher disclosure requirements would be appropriate.[119] Some, while professing to accept the principle, proposed changes that would have diluted the implementation.[120] Most, however, either endorsed the Bill as gazetted or proposed refinements to the drafting that would improve and strengthen the proposed disclosure rules. As with the submissions made to the Shewan Inquiry, it is a distinctive and very positive aspect of the tax reform process in New Zealand that private-sector actors have sometimes made such public-spirited contributions to it – notably, on this occasion, the law firm Russell McVeagh.[121] The government accepted many of the suggestions received and the amending legislation was significantly strengthened as a result. Finally, several of those making submissions suggested that the disclosure rules relating to foreign trusts should be more closely aligned with the several other disclosure regimes recently established or about to be – in particular, the rules relating to the US Foreign Account Tax Compliance Act (FATCA), the Common Reporting Standard,[122] and the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.[123] This might well be desirable, though how the government responds to the suggestion remains to be seen.

THE FOREIGN TRUSTS' RESPONSE

The amending legislation provides that foreign trusts established prior to its enactment on 27 February 2017 were obliged to register by 30 June 2017; and that foreign trusts established after 27 February 2017 are obliged to register within 30 days of their establishment.[124] Any foreign trust that was established before 27 February 2017 and that had not registered by 1 July 2017 was therefore in breach of that obligation (unless it had been wound up or no longer had a trustee resident in New Zealand). The sanction

[118] The submissions are available at https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL69669_1/tab/submissionsandadvice.

[119] See for example the submissions of TGT Legal.

[120] See for example the submissions of the NZ Trustee Companies Association Ltd.

[121] Russell McVeagh, "Submission to the Finance and Expenditure Committee on the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill". See also Ernst & Young Ltd, (EY) "Submission to the Finance and Expenditure Committee on the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill".

[122] See *Shewan Report* at [12.3].

[123] See for example the submissions of TGT Legal and Cone Marshall Ltd.

[124] Tax Administration Act 1994, s 59C(1) and (2), as added by Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, s 11. More generous time limits apply in some circumstances, but these are generally irrelevant for present purposes; see Tax Administration Act 1994, s 59C(3) and (4), as added by Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, s 11.

for non-compliance is that the exemption from tax will generally be lost,[125] with the consequence that the trustee will be liable for New Zealand tax on all of the income generated by the trust's assets, wherever in the world they are situated.[126]

As indicated above, at the end of 2016 there were about 11,750 foreign trusts in New Zealand.[127] As of 1 July 2017, however, fewer than 3,000 of them had registered.[128] Another 3,000 had indicated to the Inland Revenue that they did not intend to register.[129] Presumably they had either been wound up or moved to some friendlier jurisdiction, such as Hong Kong. Such a move would ordinarily be easy to effect by arranging for the New Zealand-resident trustee to resign as trustee and transfer the trust's assets to a new trustee (typically a company incorporated for the purpose) in the new jurisdiction. It seems reasonable to suppose that the trust deed would usually provide for the appointment of a new trustee in this way.[130] That left approximately another 6,000 trusts unaccounted for. That is, 6,000 or so trusts had neither registered nor indicated that they did not intend to do so. Presumably they, too, had either been wound up or shifted to some other country, but without informing the IRD that that was what they were doing. It is conceivable that some of them had taken neither of those courses; in other words, it is conceivable that some of them had neither been wound up nor emigrated. That seems unlikely, however, because, as indicated above, a New Zealand-resident trustee of an unregistered foreign trust is generally liable for New Zealand tax on the trust's worldwide income.

It would seem reasonable to infer that the 3,000 trusts that have registered are not being used to avoid or evade tax in any other country, or for any other criminal purpose – though they might be being used for some purpose that, whilst not illegal, is less than commendable, such as concealing assets from a spouse, creditors, or other claimants. It also seems reasonable to suppose, however, that at least some of the other 9,000 or so trusts (that is, the trusts that have *not* registered) were being used for some purpose that depended upon the government of the settlor's home country (or perhaps some other country) not finding about it. That might have been tax avoidance or tax evasion, or perhaps money-laundering or concealing the proceeds of crime.

X. CONCLUSION

It appears that the legislation implementing Shewan's recommendations has solved the problem. That is, foreigners are no longer able to use trusts established in New Zealand to avoid or evade the tax they would otherwise have to pay in their home jurisdiction – or, at least, it is much harder for them to do so. The New Zealand government can therefore hold its head up high and maintain *plausibly* that the country is no longer a tax haven (at least as far as foreign trusts are concerned). On the other hand, the government is effectively on notice that it seems likely that, in the period from 1988 to

[125] Income Tax Act 2007 s HC 26(1)(c), as added by Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, s 6(2).
[126] Income Tax Act 2007 s BD 1(5).
[127] Radio New Zealand, above, n 24.
[128] Ibid.
[129] Ibid.
[130] But see *Low Hock v Rothschild Trust (Schweiz) AG*, above n 5, in which it seems to have been necessary to obtain a court order substituting one set off trustees for another.

2016, several thousand foreigners had established trusts in New Zealand and were using them for some illicit purpose. What it will do about that remains to be seen.

7 December 2018