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CURMUDGEON'S COMMENTARY

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CHARLATANS AND CRUSADERS

Just when the administration of trusts was already a minefield, often where angels fear to tread, along comes Artificial Intelligence. My Thesaurus contains 5 positive, descriptive words when describing “artificial”, as opposed to 24 negative ones, including bogus, fake, phoney, sham, false and spurious, all of which also apply to con men – and perhaps, sometimes, also to AI. I have previously written of the wonderful new opportunities for con men that AI has given such charlatans. That said, I am pleased with the definition of “Fiduciary” provided by AI. More later.

Now, as you will read, AI is encroaching on the law. Besides the dangers surrounding AI, there remains the importance of good advice vs conmen in financial services. As for the right advice, one should, as Roman Emperor Augustus cautioned, “festina lente” (hasten slowly). Of course, such a maxim seems completely out of place in the fast-paced business environment of today. Even so, the careful, measured choice of adviser is essential, and when I am asked what is the first step one should take before embarking on an offshore strategy it is to choose your adviser wisely. The more complex the strategy the more important this becomes. Research your choice of adviser. What are their relevant qualifications and experience? The confident and competent adviser will have, if applicable, a transparent website which will answer these questions, and if it doesn't this should cast a shadow of caution. Website or not, either a personal visit (preferable) or a video call is wise.

Fundamental in the business process is the fiduciary duty every service provider owes to a client. There can be, however, no greater distillation of this obligation than in the case of trusts, and whose roots date back to the 11th century, and go to the very heart of what being a fiduciary means. The English legal historian and jurist, Frederic William Maitland, opined that *“If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence, I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea.”* As we know, the trust became one of the cornerstones of the international financial services industry.

Initially, trusts were the purview of common law, supplemented by the English Ecclesiastical Courts which, on occasion, had to draw the distinction between legal ownership and beneficial ownership. This arose when land, often owned by wealthy Crusaders fighting in the Crusades (known as holy wars) in the Middle East between Muslims and Christians in the 11th and 12th centuries had been, for expediency, transferred into the name of either a trusted friend or relative during their absence



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abroad. The common law, however was black and white at the time: legal ownership, no strings attached, belonged to the person in whose name the land was recorded, without recourse. This opened the door for the dishonest if they refused to return ownership of land, effectively only held in trust. Petitions submitted to the King for redress were usually passed to the Lord Chancellor, the King's legal adviser. At that time the Chancellor was a clergyman (often a bishop) who naturally turned to Canon law because these were breaches of a fiduciary obligation based on "conscience" and the moral necessity of keeping one's word. Eventually an English Court of Equity was established, being the branch of law dealing with fairness and justice when the strict application of common law would result in an unjust outcome. The Lord Chancellor is no longer a clergyman and Canon law has been subsumed by Equity, a distinct body of law which has been fused with common law. Whenever there is a conflict between common law and Equity, the latter will always prevail. Importantly, does the service provider chosen understand the rudimentary principles of equity? Or is his knowledge such that he could confuse equity with stock market equities?

MACHINATIONS AND HALLUCINATIONS

The key issue to grasp is that being a trustee requires the supreme level of morality, from which ethics and integrity stem through a thought process and which can only be provided by humans; AI can supplement them, yes, but never replace them. That said, as I mentioned at the beginning of this commentary, AI has now impinged on the law. A top UK law firm, using AI, inaccurately cited a statute in a straightforward insolvency application which the judge blamed on a "failure to check the accuracy of the material". An equally prominent American firm of lawyers told a US federal bankruptcy court that an important filing in a high-profile case had, in fact, contained multiple AI "hallucinations", a word that is increasingly cropping up as more and more AI mistakes, within and without the law, are revealed. Fines have been imposed on lawyers for relying, incorrectly, on information from AI, and as one seasoned journalist wrote, "AI is being overused and overtrusted". It is a good servant but a bad master.

As I have said, the fiduciary duty is not exclusive to trusts – although they truly illustrate the very essence of the matter, because the rules of Equity spill over into all spheres of business. When J.P. Morgan appeared at a 1912 congressional hearing he famously declared: "The first thing is character... Before money or anything else. Money cannot buy it ... A man I do not trust could not get money from me on all the bonds in Christendom." Ten centuries later the fiduciary obligation remains firm; whether, however, it is honoured rests on the character of the fiduciary. How archaic that assertion must sound, particularly to some young people who have been born since the start of this century.



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Leon R. Kass, a Fellow of the American Enterprise Institute noted in a lecture he delivered in 2009 that “a professed interest in human nature and human excellence – or, more generally, in truth and goodness – invites reactions ranging from mild ridicule for one’s naïveté to outright denunciation for one’s attraction to such discredited and dangerous notions.” His views formed the basis of an essay entitled (with a nod to the Greek philosopher, Diogenes) “Looking for an Honest Man”, published this year by National Affairs, the American journal. This is troubling for me as I see the slow decay of moral standards in business, and certainly since 2009.

HUMMINGBIRDS FLYING TO MARS

Because of the human traits implanted in trusteeships, and despite what digital devotees might say, I see the profession immune from domination by AI, unlike the risk it poses in many other fields.

Where AI or, indeed, the world will be in 5 years is unknown, although there is a plentiful supply of predictions from all quarters being made. On that score, I would remind you of American Senator Morris Sheppard who divined that Prohibition was here to stay, and so the resumption of alcohol sales was as likely as a hummingbird flying to the planet Mars “with the Washington Monument tied to its tail.” Three years later prohibition was repealed. Nil desperandum.

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