

# A Reply to Dame Margaret Hodge



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*To the uneducated, an “A” is just three sticks – Winnie the Pooh*

**A**ND IT WOULD BE HARD TO IMAGINE a less educated commentary on the subject of financial structuring in and through the Cayman Islands than that suggested by Dame Margaret Hodge, Chair of UK’s All Party Parliamentary Group on responsible tax<sup>1</sup>. Little wonder, the Cayman Islands does not receive the grade A it deserves.

The problem is blindingly apparent. Dame Margaret continues to confuse transparent and fully compliant jurisdictions like the Cayman Islands, which already exhibit the complete tax and all crimes transparency and proactive reporting (which she mistakenly thinks needs to be established), with jurisdictions like Panama, which do not. To think, as Dame Margaret clearly does, that the tax evasion and secrecy described in the Panama Papers could be undertaken in Cayman Islands structuring demonstrates not simply an epic misunderstanding of geography, political structure, and the distinct legal and regulatory regimes, but is clear evidence that Dame Margaret misunderstands the entire offshore narrative, which appears suspiciously close to that pedalled by the fantasists at the Tax Justice Network. The opposite position is, of course, the truth. Panama existed at the other end of the transparency and legitimacy spectrum

to the Cayman Islands precisely because Panamanian law deliberately provided the cloak for tax evasion and criminal activity that could not have existed, and did not exist, in the Cayman Islands.

To be so badly confused on this essential distinction, not only does a grave disservice to the Cayman Islands and the professionals practicing there, but also demeans the efforts of the British government over the past two decades having ensured the Cayman Islands demonstrates, as a matter of fact, world-leading transparency in relation to tax and all crimes money-laundering. Dame Margaret’s comments concerning low tax jurisdictions are equally unsound.

## Stick to the High Street

The correct and indisputable narrative is that the investments made in and through Cayman Islands structures bear tax in accordance with the laws of the jurisdiction of investment; and investors pay tax on distributions from those investments in accordance with the laws of their jurisdiction of residence<sup>2</sup>. Dame Margaret continues to fixate on the Cayman Islands having “low” (sic) taxes, as if to suggest this is in some way harmful and inappropriate when it is, in fact, irrelevant. Needless to say, she cannot articulate why it is harmful. And nor, to answer yet another invalid point that Dame Margaret implies, are Cayman Islands structures involved in tax avoidance through transfer pricing, an arrangement which

Dame Margaret, by referring to Amazon and John Lewis, claims to understand. But if she understands international tax avoidance, she must know that the Double Irish and the Dutch Sandwich and a Double Tax Treaty Network, which were the essential building blocks of the Amazon tax avoidance structure (and indeed, that of a number of other US corporates), are not structures found in the Cayman Islands. (Even to the clueless, the names of the tax avoidance techniques should give an indication of the jurisdictions involved). Dame Margaret should maintain her focus on John Lewis and Amazon and the damage to the UK High Street, where she appears on track, and not seek to implicate the Cayman Islands in tax avoidance structuring when there is no sound basis to do so.

Nor regrettably, does Dame Margaret appear to have considered earlier commentary on the subject of beneficial ownership transparency<sup>3</sup>. Whilst the grandiosity of introducing a “globally leading standard” on beneficial ownership might sound relevant and important against a domestic manifesto bankrupt of any meaningful and economically relevant proposals, the suggestion that the United Kingdom system of public access to beneficial ownership is in any way similar to or relevant to the Cayman Islands or is itself fit for purpose, is not merely unsound but on anything more than a superficial analysis, laughable. Simply put,



the Cayman Islands' system of beneficial ownership transparency requires licensed, regulated and regularly inspected service providers to verify the beneficial ownership of every 10 per cent holder of every entity with indisputable documentary evidence which is immediately available on enquiry to the proper authorities. The system in the United Kingdom is, by comparison, hopeless. Ever since Liberal Democrat MP Vince Cable decided that the monopoly or licensed and regulated company incorporators should be broken, and the world at large could form a company in the United Kingdom online directly, without verification, the United Kingdom system which Dame Margaret seeks to export, can only be described as dangerous. The UK system simply collates unverified, and often false, information. The 25 employees in Companies House are not authorised or

empowered to do anything meaningful in relation to it, and they could not in relation to over 4 million incorporations registered in the United Kingdom if they were to try.

#### World-Leading Standard

As matters stand, the Cayman Islands' system demonstrates the world leading standard, and the absence of any statistically relevant convictions in relation to tax evasion or money-laundering are clear evidence to its efficacy. Either that, or Dame Margaret and her colleague, Andrew Mitchell MP, believe that the United Kingdom and the United States law enforcement authorities, HMRC and the IRS, all of which have unrestricted access to beneficial ownership information in the Cayman Islands, are completely incompetent.

The Beneficial Ownership Register in the Cayman Islands is already available to all of

those law enforcement agencies and through them to any other law enforcement agency or tax authority making enquiry. It works. As Cyrus Vance, New York Country District Attorney, testified before the US House Task Force to investigate Terrorism Finance in June 2016, Cayman is "better positioned" to fight terrorism than the US as "that country actually collects beneficial ownership information". FBI Acting Deputy Assistant Director (Criminal Investigative Division), Steven M. D'Antuono, gave evidence to the US Senate Banking, Housing and Urban Affairs Committee in May 2019 of the "immense value in fighting financial crime" of beneficial ownership information shared by the Cayman Islands. What problem exactly are Dame Margaret and Mr Mitchell trying to solve?

The answer to that is depressing. We can only conclude that neither party



understands anything about the efficacy of the beneficial ownership disclosure system in the Cayman Islands. And we can also conclude that what the pair mean, in truth, is that it is only by making the Register of Beneficial Interests in the United Kingdom available to the public and the press that the flawed system in operation in the United Kingdom could achieve any measure of efficacy. That is to say, they have given up. They not only believe the proper authorities in the United Kingdom are incapable of making sense of the flawed data on file at Companies House and bringing any prosecutions in respect of money laundering and criminal activity, but their proposed solution, which beggars belief, is to deputise members of the press and various NGOs as guardians of UK national security to track down the illicit monies. But if I were Dame Margaret, I would then be somewhat more circumspect in seeking to export the UK system and in describing it as a world-leading standard. Dame Hodge would do well to accept the most recent advice of none other than *The Guardian* newspaper<sup>4</sup>, which has apparently seen the light, in its equally acerbic conclusions as to the flawed United Kingdom system of beneficial ownership, “Step one, forget what you think you know about offshore finance”. As far as Dame Margaret is concerned, this step, at least, would not be a time-consuming exercise.

But there is another reason why exporting the English system is entirely inappropriate. Private client structuring in the Cayman Islands has been based on the legal concept of the legitimate right to privacy, a concept now highly confused in Europe given the unresolved conflict between the European Convention on Human Rights and the new Data Protection legislation<sup>5</sup>. That is not merely an expectation of clients using the Cayman Islands on which they have relied, it is a human right enshrined in Section 9.3 of the Cayman Islands Bill of Rights, itself part of the Cayman Islands Constitution<sup>6</sup>. The Cayman Islands Constitution was carefully enacted after discussions by Order on the advice of the Privy Council pursuant to section 5 and 7 of the West Indies Act 1962 following approval by national referendum in the Cayman Islands.

## Legitimate Right to Privacy

This legitimate right to privacy in the Cayman Islands which, if it needs to be said again (and it shouldn't), yields to enquiry by law enforcement and tax authorities, is regarded as an essential by clients from Latin America and other jurisdictions where a wide range of criminal activity is driven by any visible or discernible show of wealth. Dame Margaret and Mr Mitchell should be aware that there are six kidnappings a day in Mexico City alone, nearly 2,000 a year in Mexico, and that there are similarly horrifying statistics from other Latin American countries. The sort of Beneficial Ownership Registry that they seek to impose will be trawled over not meaningfully simply by journalists of *The Guardian*, but meaningfully by extortionists, kidnappers, identity thieves, home invaders and worse. We are not much comforted on this point by FCA Chief, Andrew Bailey, admitting that an FCA industry database designed to protect consumers from unscrupulous firms has now become the weapon of choice for fraudsters. Says Mr Bailey of his Register, “I am very conscious it is a very big public register with lots of information on it that is now a target”.

Mr Mitchell is not a stupid man. But he is transparent. It is not for no reason that he describes the issues of public registers of beneficial ownership as being a matter of “National Security”. In one sense he may be right; it depends which nation you are looking at. In terms of the United Kingdom, clearly there has been a systemic failure to stem the inflow of illicit monies from the likes of Russian oligarchs and Nigerian dictators, a good deal of which has ended up invested in and has inflated the price of prime London real estate. But you cannot connect the dots. If that real estate were owned by a Cayman Islands company (less likely after the recent de-enveloping reforms), and if UK law enforcement or HMRC or Scotland Yard can ascertain the identity of the beneficial owners of that company, with absolute certainty, within an hour, how precisely does Mr Mitchell seriously suggest that anybody's “National Security” - the United Kingdom or the Cayman Islands - is improved by having the relevant Beneficial Ownership Register available to a journalist from *The Guardian*?

So, what precisely is Mr Mitchell alluding

to when he refers to “National Security”? We can surmise. He has been most likely advised, to seek comfort in the House of Lords decision in *Bancoult*<sup>7</sup>, the case which decided that the Secretary of State by Order in Council could remove the Chagos Islanders from their homeland to enable the United States to construct the Diego Garcia Military Base. But that, we may somewhat more reasonably conclude, very possibly involved a matter of National Security. The suggestion that the National Security in the United Kingdom or the Cayman Islands can be improved in exercise of the reserved power in the Cayman Islands Constitution for Her Majesty to legislate for the peace, order and good government of the Cayman Islands by the expedient of allowing journalists to inspect the Register of Beneficial Owners when Law Enforcement and HMRC can already do so, is uniquely, both risible and constitutionally impermissible.

Dame Margaret states that she has received advice to the effect that the ability of the UK Parliament to legislate in the Cayman Islands through the Secretary of State operating by Order in Council is unimpeachable. Really? It is clear from *Bancoult* that any such order is subject to the *Wednesbury* test in that any such action may be set aside if it is beyond the range of responses open to a reasonable decision maker. It may be challenged on principles of “legality, rationality and procedural impropriety”. In that context, per *The Rt. Hon. The Lord Hoffman*, the question arises as to whether the decision maker has exceeded the “margin of appreciation” in the human rights context. “The more substantial the interference with human rights, the more the Court will require by way of justification before it is satisfied that the decision is reasonable”<sup>8</sup>. The Cayman Islands Constitution specifies the legitimate right to privacy as a human right<sup>9</sup>.

A great deal was also made in *Bancoult* of the question of whether or not the Chagossians could rely on a statement made by the then Secretary of State on 3rd November 2000 to the effect that they should be authorised to return to the Chagos Islands. By majority, the finding was that there was no such legitimate expectation. But the inclusion of a legitimate right to privacy in the Cayman Islands Constitution,



on which users of the Cayman Islands have relied, is a very different matter. If that did not create a legitimate expectation on which a user of the Cayman Islands legal system relied, then what exactly would do so?

No doubt, in any proceedings to challenge an Order in Council by the Secretary of State will look to see if there is an overriding public interest that justifies the change of policy. The problem that Dame Margaret and Mr Mitchell face is that given the untrammelled access which law enforcement currently enjoys to the Beneficial Ownership Registries in the Cayman Islands, there is not one shred of possibility that any such public interest argument could be sustained.

Undoubtedly, the suggestion that the Registers of Beneficial Ownership in the Cayman Islands shall be made available to the public has caused a degree of disquiet and damage, very possibly intentionally, to high net worth private clients using the Cayman

Islands and other Overseas Territories who use now the completely opaque trusts and corporate structures available in the United States. This is irony of a high order. But ill-informed blundering of this sort by misguided English politicians creates a risk to the lives and well-being, financial and otherwise, of lawful and legitimate users of offshore financial centres. This simply cannot be accepted on an ongoing basis. ■

***The artwork accompanying this article was commissioned by the author. The artist is Michelle Bryan.***

*Endnotes*

1 *In the Chair with Dame Margaret Hodge, IFC Economic Report. Spring/Summer 2019*

2 *The EU, Economic Substance, and other complete nonsense, Anthony Travers, IFC Economic Report. Spring/Summer 2019*

3 *In the Chair – Anthony Travers, Travers Thorp Alberga – IFC Economic Report. Summer/Autumn 2018*

4 *How Britain can help you get away with sealing millions a five-step guide – The Guardian, Friday 5 July 2019*

5 *No such confusion exists in the United States where the Fourth Amendment Right to Privacy Protection remains inviolable.*

6 *In the Chair, Anthony Travers, IFC Economic Report ibid*

7 *R (on the application of Bancoult) (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant) Session [2008] UKHL 61. A 3/2 decision of the Supreme Court subsequently widely criticised as inappropriately (albeit pragmatically) applying anachronistic principles of colonialism.*

8 *Per Lord Hoffman quoting Sir Thomas Bingham MR in R v Ministry of Defence, Ex p Smith [1996] QB 517, 554.*

9 *It is outside the ambit of this article to analyse in any greater detail the flawed Constitutional thinking described by Dame Margaret but clearly Her Majesty in exercise of the reserved power in section 125 of the Cayman Constitution to act “for the peace, order and good government of the Cayman Islands” must act pursuant to the Constitution in the interests of the Cayman Islands exclusively and not pursuant to any other power and nor can the Cayman Islands Court governed as it must be by the Cayman Islands Constitution consider the application of any law in the Cayman Islands which is not derived from within the Constitution.*

