



THE DUTCH SUPREME COURT ON AScription OF TORTIOUS ACTS TO A PRIVATE FOUNDATION



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On 7 October 2016, the Dutch Supreme Court (*Hoge Raad*) ruled in the case of *Resort of the World v. Maple Leaf Private Foundation* (the “Resort of the World/Maple Leaf Private Foundation Case”) that if, in the light of what is generally accepted in society, a tortious act committed by the settlor of a Private Foundation (*Stichting Particulier Fonds*) is to be considered an act of such Private Foundation, the Private Foundation can be held liable for such act resulting in a tort liability of the Private Foundation.

1. Introduction

A Private Foundation (*Stichting Particulier Fonds*) is a specific variant of the legal form of a foundation (*Stichting*). A Private Foundation is typically set up for the same reasons as a common law trust is set up: to hold investments for the benefit of beneficiaries, for

asset protection purposes and estate planning reasons. By transferring assets to a Private Foundation these assets will be beyond the reach of the creditors of the person who transferred these assets (the settlor) to the Private Foundation, provided that the transfer was not made in order to prejudice creditors of the settlor, as it becomes clear from the *Resort of the World/Maple Leaf Private Foundation Case*.

2. The Resort of the World/Maple Leaf Case

In the *Resort of the World/Maple Leaf Case*, the Dutch Supreme Court in the first place ruled that transferring an asset to a Private Foundation for it to manage it for the beneficiary of the Private Foundation does not constitute a tortious act in itself as it serves the objective of a Private Foundation. However, transferring an asset to a Private Foundation in light of an expected recovery claim and in order to prejudice the rights of creditors of the settlor to recovery,

may be considered a tortious act. The Private Foundation may under certain circumstances be held liable for these actions of the settlor.

The Supreme Court further ruled on the basis of existing case law, that decisive for the ascription of a tortious act of a natural person to a legal person is, whether in the light of what is generally accepted in society, the act concerned is to be considered an act of the legal person. In view hereof, the Supreme Court considers it possible that the Private Foundation is held liable for the tortious act committed by the settlor, on the basis that the settlor had full and dominant control over the Private Foundation and by exercising this control he has involved the Private Foundation in committing the tortious act as well. In other words, it is possible that the tortious acts of the settlor can be ascribed to the Private Foundation if the settlor has full and dominant control over the Private Foundation. Based on this ascription, creditors of the settlor may recover damages

incurred from the Private Foundation and its assets.

3. Conclusion

Separation of assets by the use of a Private Foundation is a legitimate way of protecting those assets against recovery by creditors. However, if a tortious act committed by the settlor can, in light of what is generally accepted in society, be ascribed to the Private Foundation, then the Private Foundation may be held liable by the creditors of the settlor and the assets that have been transferred to the Private Foundation will be subject to recovery by the creditors of the settlor.



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