

FOCUS on Trusts, Foundations & IBCs

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The information contained in this newsletter is provided for the general interest of our readers, but is not intended to constitute legal advice. Clients and the general public are encouraged to seek specific advice on matters of concern. This newsletter can in no way serve as a substitute in such cases.

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International Business Companies (IBCs) - A Refresher Course

In The Bahamas there are two types of companies, those incorporated under the Companies Act, 1992 and those incorporated under the International Business Companies Act, 2000, as amended by the International Business Companies (Amendment) Act, 2001 and the International Business Companies (Amendment) Act, 2004 (the IBC Act). This article will discuss the International Business Company more commonly referred to as an "IBC" and will highlight some of its features.

The Bahamian IBC is an ideal vehicle for offshore work and The Bahamas is acknowledged as one of the leaders in the industry. The IBC provides for ease of administration at an economical price.

Incorporation of an IBC

An IBC is incorporated when the Certificate of Incorporation is issued after the Memorandum and Articles of Association have been filed at the Companies Registry. It is from the date of the Certificate of Incorporation, that a body corporate comes into existence endowed with the full capacity of an individual who is *sui juris*, subject to any limitations imposed by the Memorandum of Association and/or by the IBC Act.

Company Name

Words such as "Bank", "Building Society" and "Chamber of Commerce" may not be used without the prior approval of the Registrar of Companies. Names which denote a connection with the

Royal Family or a government department are prohibited and a name similar to that of an existing company may not be used.

If the company has limited liability, any of the words "Limited", "Incorporated", "Corporation", "Société Anonyme", "Gesellschaft mit beschränkter Haftung" or "Sociedad Anonima", or their abbreviations, can be used.

Memorandum and Articles of Association

The Memorandum and Articles of Association together constitute the organisational and governing documents of the IBC.

The Memorandum of Association would contain a statement of the objects for which the company has been formed (which is usually kept as broad as possible) its authorised capital and the designations, powers, preferences and rights, qualifications, limitations or restrictions of the shares of the company.

The Articles of Association would contain the rules by which the internal management of the company is to be conducted and provides therein rules and procedures for meetings of members, appointment and removal of directors, meetings of directors, appointment of officers, issue and transfer of shares etc.

Amendments to the Memorandum or Articles of Association have to be filed with the Companies Registry within twenty-eight days of the amendment and amendments to the Memorandum or Articles of Association

International Business Companies - A Refresher Course Cont'd

are not effective until registered with the Companies Registry.

Corporate powers

An IBC can engage in any activity that is not prohibited by any law in force in The Bahamas and can be used to carry on external insurance and can also be used as a vehicle for an investment fund. There is no requirement for an IBC to receive any corporate benefit when entering into a transaction.

Ultra Vires doctrine

Acts by a company are *ultra vires* (that is, beyond the scope of a company's authority) if they exceed the purposes specified in the objects clause of the Memorandum of Association.

Share capital

An IBC may be limited by shares or by guarantee or by both, i.e., by shares and by guarantee.

Shares can be issued with or without par value and in fractions. Certificates need not be issued in respect of registered shares. Whereas, the purchase and ownership by an IBC of its own shares is permitted, an IBC can not issue bearer shares.

Registered Office and Registered Agent

An IBC must have a registered office and a registered agent in The Bahamas. Registers of shareholders, directors and officers and the company's records are normally kept at the registered office. Also, there is no requirement to display the company's name at its registered office.

Register of directors, officers and shareholders

An IBC is required to keep a register of directors

and officers which must be filed at the Companies Registry. Also, any changes to the directors or officers of an IBC have to be filed within 12 months of the changes.

Additionally, an IBC is required to keep at its registered office a register of shareholders. This particular does not have to be filed at the Companies Registry. Significantly, information regarding the shareholders in an IBC is not a matter of public record.

Directors and management

Unless otherwise provided in the Articles of Association or in a unanimous shareholders agreement, directors are responsible for the management of the company.

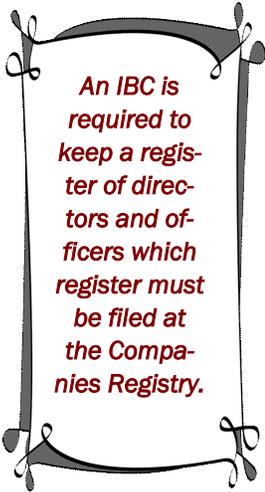
An IBC must have at least one director who may be an individual or a corporation. Directors are initially elected by the subscribers to the Memorandum of Association and thereafter by the members or, where permitted by the IBC's Articles of Association, by the directors. Directors need not be citizens or residents of The Bahamas. Resolutions may be passed by written consent so that meetings are not necessary.

Members

An IBC must have at least one member. A member may be of any nationality and may be an individual or a corporation. There is no requirement for annual meetings of members of an IBC.

Secretary

A secretary is not obligatory but is usually appointed. The office may be filled by an individual or a company. A sole director may also act as secretary.



An IBC is required to keep a register of directors and officers which register must be filed at the Companies Registry.

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International Business Companies - A Refresher Course Cont'd

Company Seal

The Act requires that IBCs have a seal, and an imprint of the seal must be kept at the registered office. Seals may be used outside The Bahamas.

Charges

It is possible to file a copy of any document creating a mortgage, charge or other encumbrance of the assets of an IBC at the Companies Registry.

Also, an IBC has the option of submitting for registration to the Companies Registry a copy of its register of mortgages and charges (if any) and is bound by the contents of such register until it elects to cease to register charges in its register.

Registration of the document creating a mortgage, charge or other encumbrance or the register of mortgages and charges merely gives notice of the charge to the world at large.

Accounts and audits

An IBC shall keep such accounts as the directors consider necessary or desirable in order to reflect the financial position of the company. There is no audit requirement or provision for accounts to be lodged with the Companies Registry.

Disposition of assets

Where there is to be a disposition of more than 50 per cent of the assets of the company and where that disposition is not part of the regular course of business carried on by the company, then it must be:

- (i) approved by the directors; and
- (ii) submitted to the members for approval who must either consent at a meeting or in writing.

A disposition is any sale, transfer, lease exchange or other disposition.

Maintenance of capital and dividends

Subject to any limitations in its Memorandum or Articles of Association, an IBC may by resolution of directors, declare and pay dividends in money, shares or other property.

Dividends shall only be declared and paid if the directors determine that immediately after the payment of the dividend, (i) the company will be able to satisfy its liabilities as they become due in the ordinary course of its business, (ii) and the realisable value of the assets of the company will not be less than the sum of its total liabilities, other than deferred taxes, and its issued and outstanding share capital.

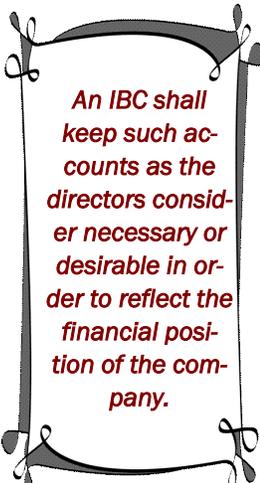
Merger and consolidation

Merger and consolidation may be achieved between two IBCs (including a parent with a subsidiary) or between an IBC and a company incorporated under the Companies Act, 1992 provided, in the latter case, the surviving entity meets the requirements of an IBC. An IBC may also merge with a foreign company, or a subsidiary.

An IBC may also consolidate with other companies to form a new consolidated company. Additionally it is possible for an IBC to enter into plans of arrangement effecting reorganisations, reconstructions and separation of businesses, which plans require court sanction.

Continuation as an IBC

The Act provides for certain companies that are not IBCs to continue as IBCs. Where the continuing company is a foreign corporation *cont'd pg 4* there is no need for reciprocal arrangements



An IBC shall keep such accounts as the directors consider necessary or desirable in order to reflect the financial position of the company.

International Business Companies - A Refresher Course Cont'd

there is no need for reciprocal arrangements with the jurisdiction of original incorporation.

Companies which can continue are those which are incorporated under the Companies Act of The Bahamas and/or those which are incorporated outside The Bahamas. Such companies must be in good standing prior to continuance.

Exchange Control and Stamp Duty

Generally speaking, an IBC is exempt from the Exchange Control Regulations and from the payment of stamp duty.

However, if shares in an IBC are to be owned by a person who is a resident of The Bahamas for Exchange Control purposes or the IBC desires to carry on business with residents of The Bahamas for exchange control purposes the prior approval of the Central Bank of The Bahamas will have to be obtained.

Also, any issue or transfer of shares in an IBC resulting in a change in beneficial ownership would attract stamp duty if such IBC owns real property situated in The Bahamas or if the IBCs business in The Bahamas is a "resident business".

Further stamp duty would also be payable on the disposition by an IBC of real property or a "resident business" in The Bahamas.

There are no corporation taxes, withholding taxes, capital gain taxes or any other tax on income or distributions payable.

Fees

There is a registration fee of \$330.00 payable to the Companies Registry on incorporation. There is an annual licence fee payable to the Companies Registry in the amount of \$350 for a company with a capital not exceeding \$50,000 and \$1,000 for a company with a capital exceeding \$50,000.

A change in beneficial ownership would attract stamp duty if such IBC owns real property situated in The Bahamas or if the IBCs business in The Bahamas is a "resident business".

Higgs & Johnson Partner Receives 'Distinguished Service Award'



Ms. Surinder Deal - Partner of Higgs and Johnson

Higgs and Johnson wishes to congratulate Ms. Surinder Deal (partner) on receiving the 'Distinguished Service Award' from Terralex.

Ms. Deal along with Mr. Oscar Johnson (partner) and Mr. Vann Gaitor (partner) attended the 18th annual general meeting of TerraLex - the international network of independent law firms comprising more than 16,000 attorneys in more than 100 countries. The AGM was held in Cape Town, South Africa.

At the meeting, Ms. Deal was re-appointed as Regional Chair for Central America and the Caribbean regions. She was also re-elected as one of the twenty five Directors of Terralex.

Comparison of Foundations and International Business Companies (IBCs)

Introduction

As one of the world's premiere wealth management centers, The Bahamas has in place a wide range of financial services legislation to facilitate the estate planning and asset protection needs of high net worth individuals. While we have introduced and discussed Bahamian Private Foundations in previous editions of FOCUS, this article will highlight a comparison of Foundations with companies incorporated under the International Business Companies Act, 2000 as amended (the IBC act).

What is a Foundation?

A Foundation is a separate legal entity which is governed by its charter. A Foundation may be established by registration pursuant to the provisions of the Foundations Act, 2004 as amended (the "Act"). Upon the proper registration of a Foundation, it will be resident and domiciled in The Bahamas capable of owning assets, suing and being sued in its own name. A Foundation must be initially funded and always maintain assets consisting of either cash or property in excess of \$10,000. All assets transferred to a Foundation will become the assets of such Foundation and will no longer be considered the assets of the founder or donor.

Foundations may be used as vehicles for the holding of private assets endowed on the Foundation for the benefit of an identified person, class of persons or the public at large. The Act requires the main purpose of the Foundation to be the management of its assets which may include the purchase and sale of assets and engaging in any other activity not prohibited by law; however, the Act requires that business transac-

tions should be secondary to the main purpose of the Foundation.

Comparison with an IBC

Some of the similarities between a Bahamian Foundation and a company incorporated under the IBC Act (a "IBC") are as follows:

(i) *Separate legal entity*

Like an IBC, a Foundation is a separate legal entity which is able to sue and be sued in its own name. A Foundation can therefore contract on its own behalf and in its own name pursuant to section 3(2) of the Act.

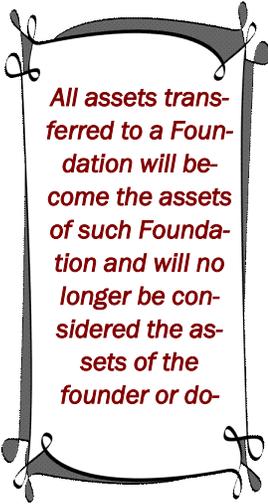
(ii) *Pre-registration contracts and Pre-incorporation contracts*

Any action carried out in the name of a Foundation or purportedly on its behalf of the Foundation before the date of its registration can be ratified by the officers of the such Foundation, after its registration as a Foundation. Upon ratification, any action shall be deemed to be an action of the Foundation pursuant to section 25 of the Act.

Similarly, an IBC that enters into a contract prior to its incorporation can later adopt the contract. The act of adopting the contract will bind the IBC and entitle it to the benefits of such contract as if it had been in existence at the date of the contract.

(iii) *Unlimited duration*

Like an IBC, a Foundation can be created for an indefinite period, must be registered in order to establish and maintain its legal existence and is required to have a registered office in The Bahamas.



All assets transferred to a Foundation will become the assets of such Foundation and will no longer be considered the assets of the founder or do-

Comparison of Foundations and IBCs Cont'd

(iv) Redomiciliation

Like an IBC, a Foundation can redomicile to The Bahamas and a Foundation registered in The Bahamas can be redomiciled in another jurisdiction pursuant to section 51 of the Act.

(v) Liquidation

A Foundation, like an IBC, can be liquidated. The Act provides at section 52(1) for a Foundation to be liquidated in the following instances:

- where the Foundation was established for a definite period and that period has expired;
- where the officers have unanimously resolved to liquidate the Foundation but only if:

(i) the effect of an amendment to the foundation charter made pursuant to the Act requires it to be liquidated;

(ii) where the objects of the foundation have been fulfilled or have become incapable of being fulfilled; or

(iii) where any provision of the foundation charter requires it.

- where the Foundation is unable to pay its debts; or
- where the Supreme Court of The Bahamas has ordered the liquidation of the Foundation.

(vi) Striking-off

Similar to an IBC, a Foundation can be “struck-off” the Register of Foundations by the Registrar General in the following instances:

- where the Registrar General has reasonable cause to believe that the Foundation no longer satisfies the requirements prescribed by the Act for the Foundation

- where the Foundation has failed to pay any licence fee under the Act.

In the foregoing cases, the Registrar must serve on the Foundation a notice that the name of the Foundation may be removed from the register of Foundations. The Act then prescribes a procedure which allows the Foundation to respond to the notice. Failing a satisfactory reply, the Registrar has the authority to remove the name of the Foundation from the register pursuant to section 54 of the Act. However section 55 thereof contains a process for the restoration of the Foundation's name to the Register

(vii) Exempt from taxes

Like an IBC, a Foundation is generally exempt from the payment of any business licence fee, income tax, capital gains tax or any other tax on income or distributions accruing to or derived from such Foundation or in connection with any transaction to which that Foundation is party pursuant to section 69 of the Act.

Some of the differences between Bahamian Foundations and IBCs are as follows:

(i) Minimum assets

While a Foundation is required to have and maintain at all times during its existence, minimum assets of \$10,000 in Bahamian Dollars or its equivalent in any other currency, there is no such minimum requirements under the IBC Act.

The initial assets of the Foundation do not need to be in the form of cash and may comprise real property. It is also worth noting that, section 6 (2)(i) of the Act, provides for the foundation charter to include provisions allowing the endowment of supplementary assets of the Foundation in addition to the initial assets.



A Foundation is required to have and maintain at all times during its existence, minimum assets of \$10,000.

Comparison of Foundations and IBCs Cont'd

(ii) *Charter vs. Memorandum and Articles of Association*

The document which forms the Foundation is known as the foundation charter whereas in the case of an IBC the formation documents are its memorandum and articles of association. One notable distinction between the formation documents of IBCs and Foundations is that the foundation charter is not a public document and does not have to be registered with the Registrar General in order to establish a Foundation.

In addition to the foundation charter, a Foundation may also have articles which may include information which will assist in the administration of the Foundation such as details of how the assets of the Foundation should be distributed by the governing body or provide specific details with regard to the identification of the beneficiaries of the Foundation. One difficulty which may arise from having both a foundation charter and articles would stem from the probability of overlapping provisions in the separate documents which can lead to confusion.

(iii) *Foundation Council vs. Directors*

An IBC must have one or more directors who in turn have the authority to appoint officers. By contrast, the appointment of a foundation council is optional, but when there are no officers appointed, the charter must provide for the appointment of a council which may consist of (i) two or more natural persons or a legal person and (ii) one or more natural persons or (iii) a legal person by itself.

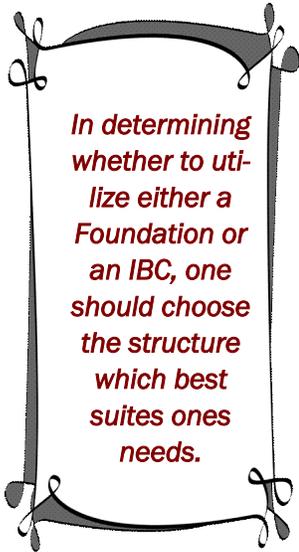
The duties of a foundation council shall be (a) to take such action as it may deem necessary to ensure compliance by the Foundation and its officers with the provisions of the foundation charter and the articles (if any) and the Act, and (b) to supervise generally the management and conduct of the Foundation by its officers. Of course, the foundation charter or articles (if any) may specify certain incorporated powers of the foundation council in addition to those set down in the Act.

(iv) *Asset Protection*

The Fraudulent Dispositions Act, 1991 ("FDA"), which applies to a foundation, provides that every disposition of property made with an intent to defraud and at an undervalue is voidable at the instance of the creditor thereby prejudiced. The burden is on the creditor seeking to set aside the disposition to prove that there has been an intent to defraud and the FDA provides that no action or proceeding can be commenced unless the action or proceedings are commenced within 2 years of the date of disposition. This will give assets transferred to the Foundation "asset protection" once the limitation period of 2 years has passed. By contrast, the FDA does not apply to IBCs.

Conclusion

In determining whether to utilize either a Foundation or an IBC, one should choose the structure which best suits one's needs.



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Lyford Cay
Freeport
Marsh Harbour

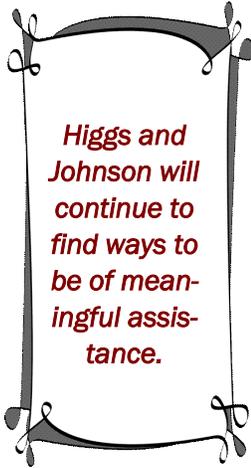
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Higgs & Johnson Represented at STEP Awards

Ms. Heather L. Thompson partner at Higgs and Johnson (pictured left) represented the law firm when she attended the Society of Trust & Estate Practitioners (STEP) awards banquet in London, England. She currently serves on the panel of advisors to the judges for the Institutional Trustee of the Year Award. Ms. Thompson has served on the panel since inception in 2005. Higgs and Johnson was short listed for Team of the Year in 2006.

Higgs and Johnson Support the Inagua Aid Relief Effort in the Aftermath of Hurricane Ike



Pictured above: Mr. Billy Holowesko (General Manager -Odyssey Aviation) & John Delaney (Managing Partner - Higgs and Johnson)

In the aftermath of Hurricane Ike and its devastating impact on Inagua, Higgs and Johnson did not delay when called upon by Odyssey Aviation to provide funding for emergency airlift to Inagua. Managing Partner, Mr. John Delaney, visited Odyssey Aviation to get a first hand look at the relief effort. Higgs and Johnson also initiated a relief drive amongst their staff for the collection of foodstuff for the community of Inagua. Mr. Delaney stated that Higgs and Johnson will continue to find ways to be of meaningful assistance.

Higgs and Johnson Supports Lee National Denim Day & Breast Cancer Awareness Month



The month of October is deemed National Breast Cancer Awareness Month. The staff of Higgs and Johnson joined the National Breast Cancer Awareness Initiative, the Cancer Society and the Sister Sister Cancer Support Group by participating in the annual Lee National Denim Day – Oct 3rd, 2008.

This initiative was started in 1996 by Lee Jeans employees and has grown to become one of the largest

single-day fundraisers by raising more than \$70 million in the fight against breast cancer.

The management of Higgs and Johnson relaxed the dress code for that day and allowed staff members (pictured above) to wear their favorite jeans with the designated pink or white t-shirts. In addition, pink pins and wristbands were also purchased and worn.

Higgs and Johnson joined millions around the world on that day in an effort to increase awareness of breast cancer. It is the ongoing hope that this will help in one day finding a cure against the disease.

Case Report: Caroline Susan Gresson and H.A.E. Trustees Ltd. Et al

This decision by the English High Court involved a claim by trust beneficiaries against the directors of a trust company for alleged breaches of duty supposedly effected by the trust company as trustee of a particular trust. This claim was contrary to the usual approach, whereby such beneficiaries would have sued the trust company directly. In this regard, the complainant sought to assert by this indirect method what is known as a “dog-leg claim”.

A “dog-leg claim” is the term used in English law to refer, as noted above, to a claim brought by beneficiaries against the directors of a trust company for breach of their duties as directors. The basis for such a claim is the principle that directors have a duty of care to the company and that, if they fail to discharge those duties properly, the company has a right of action against such directors. It is further contended that this right to have the directors perform their duties in the statutorily prescribed manner is an asset of the trust and that the corporate trustee holds the right of action as trust property for the benefit of the beneficiaries. If, therefore, the corporate trustee is not prepared to enforce the right of action against the directors, the contention is that the beneficiaries may do so in its stead.

In The Bahamas, the directors’ duties referred to above are contained in section 81 of the Companies Act.

Because of the long-standing and oft-upheld legal principle that the directors of a company owe their duties to the company, the success of claims such as these would open a Pandora’s box with regard to established principles of company law. Such an eventuality would be viewed, almost universally, as a most unfavourable development and one that would likely have many undesirable consequences in law.

At the centre of the dispute in the **Caroline Susan Gregson v H.A.E. Trustees Ltd. et al** case was a discretionary private trust the assets of which exclusively comprised shares in the settlor’s family’s furniture business.

After many years of successful trading, the said business went into administration, thereby causing the trust’s assets to become worthless. One of the family members, who was a beneficiary of the trust, brought a claim against the trustee company alleging, *inter alia*, that:

...[H.A.E. Trustees Ltd.] was in breach of duty in failing to review the need to diversify the assets of the Settlement and that had it done so, and taken appropriate professional advice, it would have diversified and avoided the losses it has suffered.

In their defence, the Defendants claimed:

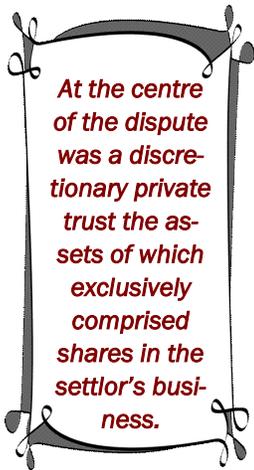
...first, that the dog leg claim lacks reasonable grounds or has no real prospect of success, and, secondly, that HAE did not owe any duty to review diversification of the trust funds because, under the Settlement, the ... shares were to be held in their original form until HAE decided in its discretion to convert them into money for future investment, and that until that happened there was no duty to consider diversification.

Robert Miles Q.C., sitting as a Deputy Judge of the High Court ruled as follows:

i. the company may have a claim against the directors but the corporate trustee did not hold such a claim on trust for the beneficiaries; and

ii. directors owe a duty of care to the company only. This duty is different from the duty which a corporate trustee owes to the beneficiaries of a trust; to find otherwise would mean setting aside established

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Case Report: Caroline Susan Gresson and H.A.E. Trustees Ltd. Et al Cont'd

company and employment law principles.

This decision followed the decision of the Court of Appeal in **Bath v. Standard Land Co. Ltd.** [1911] 1 Ch 618 in which the matter under consideration concerned an account between the owner of an estate and a company which acted as manager of the estate. One of the issues on the taking of the account was whether the directors of a company acting as a trustee owe direct fiduciary duties to the beneficiaries of the trust. In holding that they do not, the Court of Appeal said:

“Directors stand in a fiduciary relation to the company, but not to a stranger with whom the company is dealing. It is of course true that a company acts through its directors. But that does not involve the proposition that if a breach of trust is committed by a company acting through its board a beneficiary can maintain any action against the directors in respect of such breach of trust. Of course I except the case where trust property can be followed into the hands of a director or of any stranger with notice. No such point arises here.”

Continuing further, Cozens-Hardy MR said at p. 67:

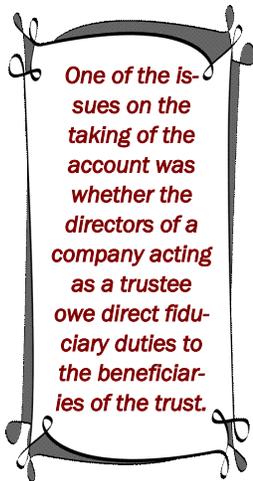
“I base my decision upon the broad principle that directors stand in a fiduciary position only to the company, not to creditors of the company, not even to individual shareholders of the company, still less to strangers dealing with the company. This principle applies equally whether the relation between the company and the stranger is one purely of contract, such as principal and agent, or as one of trustee and cestui que trust. To speak of the directors as the "brains" of the company or the "hands" of the company is only to use words which have no definite meaning in this connection.”

In the more recent decision of **Young v Murphy**

[1996] 1 VR 279, the Court of Appeal addressed itself, for the first time, to the “dog leg” issue and it did so in some detail. In the instant case, the court made reference with approval to the following passage from the judgment of Phillips J in **Young v Murphy**:

“The business activity of BPTC as trustee of these trusts was itself the framework within which the directors came to perform the duties which they owed to the company by virtue of their office as director; but the duties which were owed are none the less general duties and are not owed to the company in some specific role or character, or at least they are not owed to the company in some specific role or character when the duties are alleged to have arisen only in virtue of the office which is held. In this, such duties may be contrasted with some specific contractual obligation undertaken by a third party to the company and undertaken to the company when acting in some particular capacity ... In such cases, the benefit of the contractual obligation may well be held by the executor or by the trustee for and on behalf of the deceased's estate or the trust, as the case may; but no sufficient basis is made here for any such conclusion in relation to the directors' duties which arose simply by virtue of the office.

It follows that if there be a breach by the directors of the duties which they did owe to the company, being the former trustee BPTC, and if the company was thereby damaged, BPTC might have a right of action against the directors for breach of their duties. In so far as those duties were founded in the common law, there might be a right of damages and, if they be fiduciary duties, there might be a right to equitable compensation. Either way, it is the company in which the right of action is vested. The plaintiffs now claim to have succeeded to



Case Report: Caroline Susan Gresson and H.A.E. Trustees Ltd. Et al Cont'd

to that right of action by virtue of their appointment as new trustees, but by what right can that be so? The right of action held by the former trustee cannot be shown to have been trust property; there is no basis upon which to conclude that it was ... the directors cannot be said on the pleading in this case to have owed their duties to the company only in relation to some particular trust or trusts; nor were those duties imposed upon them in relation to some particular item or items of trust property as such. Rather the existence of both the trusts and the trust property was but the context in which the duties fell to be discharged by those who owed duties to the company generally as its officers. There is no basis then, for supposing that the right of action was trust property in the hands of BPTC or for supposing that the right of action passed to the new trustees, upon their appointment as such.

On that basis, it follows that any right of action against the former directors for breaches of duties said to have been owed to BPTC remains with that company."

In 2007, in the case of **Alhamrani v Alhamrani [2007] JRC 026**, the Royal Court of Jersey considered the arguability of a "dog leg" claim against directors. Again the court refused to entertain the validity of such a notion and stated:

"...the notion that the right to performance of the standard statutory duties owed by a director to his company (as it is put in the first party's pleading) or the duty of a director not to cause loss to his company or the company's cause of action arising from breach of any such duty (as it is put elsewhere) is, in the ordinary way to be regarded in law as the "asset" or "property" of the trust of which the company is trustee, seems to me to have a degree of artificiality and awkwardness about it that is not easy to accommodate - at least in circumstanc-

es which are not such that the imperatives of justice leave no other alternative. Other considerations apart, it would introduce subtleties of inter relationship between trust and company law that can only lead to uncertainties of a kind that principals, insurers and advisers, as well as the law itself, could do without. And the mere fact that a director may have had particular responsibility for the affairs of the particular trust cannot, in my view, be sufficient to displace a fundamental nature of a director's statutory duties to his company..."

The Jersey court went on to assess the effect approval of a dog leg claim would have on the established principles of law:

"The dog leg claim, if valid, would, for all practical purposes, circumvent the clear and established principle that no direct duty is owed by the directors to the beneficiaries. The refusal of the law to accept that directors of a trustee company owe a direct duty to safeguard the assets of a trust of which it is trustee is, I consider, a powerful reason to doubt that directors may be liable to the beneficiaries of the trust by the indirect, dog leg, route now proposed."

Finally, the said court concluded its assessment of the arguments on this point by stating that:

"... the dog leg claim has no real prospect of success and ... there are no reasonable grounds for asserting it. The claim against the director defendants must therefore be struck out."

In coming to its decision in H.A.E. Trustees, the Court did not consider it to necessary, strictly speaking, to address the second issue regarding the duty to diversify the assets of the Settlement; nevertheless it acceded to the parties' request of the parties for a ruling on the point.

In so doing, the court said that the duty in s 4 (2) of the English Trustee Act 2000 ('the English Act') was a separate and independent duty,

...it follows that any right of action against the former directors for breaches of duties said to have been owed to BPTC remains with that company.

Case Report: Caroline Susan Gresson and H.A.E. Trustees Ltd. Et al Cont'd

which was not restricted to exercise the power of investment. It is significant to note that Section 4 (2) of the English Act corresponds to section 5(1)(c) of the Trustee Act 1998 of The Bahamas.

The court ruled that shares held under a discretionary trust were investments of the trust for the purposes of section 4(2) of the Act. Section 4(2) provides that "a trustee must from time to time review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied."

Deputy Justice Miles, in dealing with the issue of diversification, pointed out that:

"... section 4(3)(b), which deals with diversification, contains the qualification "in so far as is appropriate to the circumstances of the trust ... the section 4(3) duty is a duty to review and consider diversification of the investments of the trust, it is not a duty to diversify."

The Court's ruling in H.A.E. Trustees makes it even less likely that beneficiaries of a trust will be able to bring a successful "dog leg" claim against the directors of corporate trustees. However, it will not impair or fetter the conventional rights of recourse enjoyed by an aggrieved beneficiary.

Repeal of Exemption of Sales Tax on Imports from Florida Rejected by State Supreme Court

The first issue of *FOCUS* in 2008 reported with some anxiety on the proposal of the Taxation and Budget Reform Commission of the State of Florida (the "Reform Commission") to have a Referendum, identified as Amendment 5, asking voters to eliminate about \$9-billion in property taxes that would benefit Florida schools and to approve the repeal of exemptions and exclusions from state sales tax that applied to persons exporting most goods from Florida. The rationale for the proposed repeal is that it would advance or serve a public purpose.

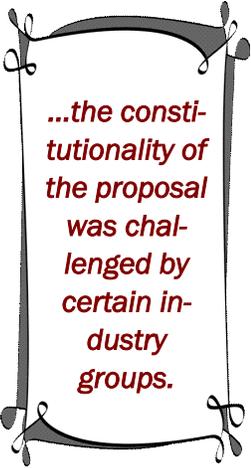
It was explained that the revenue that would have been raised by the taxation of all Florida school property would cease after 2009, and that such revenue would come instead from the savings to the Florida Treasury by the repeal of the sales tax exemption provided to businesses and persons who export goods from Florida.

However, the constitutionality of the proposal was challenged by certain industry groups. A Circuit Court in August, 2008, found misleading the ballot title and summary for Amendment 5 and ordered the removal of the proposal from the November ballot. The ruling was appealed to the Florida Supreme Court which

unanimously upheld the same after hearing oral arguments for only a few hours.

This meant that the Referendum could not be placed on the November, 2008, ballot. For the time being the issue is moot, and Bahamian importers, wholesalers and retailers can rightly feel that they dodged the proverbial bullet. After all, if they had to pay the proposed 6% sales tax, the cost for such imported goods to The Bahamas would have increased at least by 10%.

The President of The Bahamas Chamber of Commerce estimated that the 6% on at least a billion dollars worth of goods imported directly from Florida would have resulted in additional costs of \$60 million per annum. When this is placed alongside the increased import duties levied by the Bahamas Government in July, 2008, the Bahamian economy would definitely have taken a dramatic downturn even beyond that presently experienced because of the global economic crisis. In any event, The Bahamas, the Caribbean and Latin America can breathe a little easier – for the next couple of years, at any rate.



...the constitutionality of the proposal was challenged by certain industry groups.

Trustee Insolvency

In The Bahamas, on a winding up of a Trustee, assets held by the Trustee as trustee and their proceeds (provided they have not been mixed with the general assets of the Trustee and are readily identifiable) would not be available to satisfy the claims of creditors of the Trustee as such assets and their proceeds will be held on trust for the beneficiaries of the Trust, except:

to the extent that the Trustee has a personal right against such assets under the Trust (for example an indemnity for expenses); or

in respect of a secured creditor granted security over assets of the Trust, such a creditor would be entitled to rely on such security interest in such assets, at least to the extent the security was granted by the Trustee in accordance with its rights, powers and duties under the Trust.

In light of the turbulent financial markets, it is not surprising that this issue is one which is being raised with increasing frequency by settlors and beneficiaries of trusts.

The recent ruling of Justice Lyons in the case of *Dominion Investments (Nassau) Ltd (In Liquidation) (Comm. Div. 10 of 2006)* has been misconstrued by some commentators as having eroded the above stated principle of law, and we feel that this is a good opportunity to set the record straight.

Firstly, the case did not involve a trust company, but rather a Companies Act company which held some assets in trust for its clients. Further, the principle on which the case was decided, namely that the Court can make an order that a liquidator's remuneration and costs are to be met from trust assets held by the company where the remuneration and costs in question bear a direct relation to work done by the liquidator in recovering and protecting trust assets, is not ground breaking. Justice Lyons is following recent Australian and English precedents and in particular the English case of *Berkeley Applegate (Investment Consultants) Ltd (In Liquidation) 1989 Ch32*.

In his ruling, Justice Lyons seeks to follow the principle that where a person wishes to enforce a claim to an equitable interest in property, "the court has a discretion to require as a condition

of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. That, since the work done by the liquidator had been of considerable benefit to both the trust property and was work that would have had to be done either by the investors themselves or by a receiver appointed by the court (whose fees would have had to be borne out of the trust property), the court would exercise its inherent jurisdiction to ensure that a proper allowance was made to the liquidator; and that the liquidator was to be compensated out of the trust funds to the extent that the company's assets were insufficient to compensate him adequately for his costs, skill and labour." Justice Lyons also notes that the confidentiality (which was of paramount importance) that the clients achieved because the liquidator did the work would not have been possible otherwise.

Justice Lyons uses the words "notional aggregation of the trust monies with the company's assets," which has excited some criticism, however, this wording is taken directly from *Far Eastern Capital Futures Ltd. 5 BCC 223*, a British case, and is not original to Justice Lyons. It is clear from his judgment that any such notional aggregation would be limited to work which benefits the trust property.

In the case of *Space Investments Ltd v Canadian Bank of Commerce Trust Co (Bahamas) [1983]*, a case concerning trust assets held by a Bahamian Bank, where it was clear that the assets were not held by the bank for itself, but were held exclusively for the benefit of a particular class of persons, it was held that the assets (i) would not form part of the general assets of the bank and (ii) would not be available for distribution to the general creditors of the bank upon its liquidation.

In The Bahamas, the central principle that trust assets are not available to meet the claims of creditors in a winding up has in no way been undermined or deviated from in the *Dominion* case or otherwise.

In light of the turbulent financial markets, it is not surprising that this issue is one which is being raised with increasing frequency by settlors and beneficiaries of trusts.