



EXTERNAL INSURANCE ACT, 2009 & ACCOMPANYING REGULATION

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The Insurance Commission of The Bahamas (the "Commission") has made several regulations pursuant to the External Insurance Act 2009 (the "EIA 2009") including: the External Insurance (Capital Requirements for External Insurers, Insurance Managers and External Insurance Brokers) Regulations, 2010, (the "CRR 2010"), the External Insurance (Classes of Insurance Business) Regulations, 2010, (the "CIBR 2010"), the External Insurance (Variable Insurance Business) Regulations, 2010, (the "VIBR 2010") and the External Insurance (Forms and Fees) Regulations, 2010, (the "FFR, 2010"). This Article introduces readers to key ways in which these regulations affect the provision of external insurance services and looks at Licensing Procedure, Classes of Business, and Financial Obligations.

Licensing Procedure

Under the EIA 2009, an External Insurance Intermediary ("EII") may be a company incorporated pursuant to the International Business Companies Act, 2000 or the Companies Act, 1992 (a "Bahamian Company"). An External Insurance Company ("EIC") may however take the form of either a Bahamian Company or a company incorporated outside of The Bahamas. Applications for licensing companies incorporated outside of The Bahamas must be accompanied by information specified under the EIA 2009, including evidence that such company:

- is lawfully constituted and duly authorised and licensed to undertake insurance business in accordance with the laws of the country where it is incorporated; and
- has undertaken insurance business in that country for a period satisfactory to the Commission and is subject to regulations in its country of domicile under a regime which in the Commission's opinion is at least

comparable to that of The Bahamas.

Applications for licenses as an EIC or EII must now be made to the Commission in the form prescribed under the FFR 2010. The Commission may approve or refuse the application of any EIC or EII. Where the Commission refuses a licence, the applicant must be notified in writing of the reasons for such refusal and of its rights to appeal such refusal.

If the Commission approves an application for licensing and the applying EIC has paid the relevant fee as set out in the FFR 2010, the Commission may designate it as either:

(i) a Restricted External Insurer ("REI"), which is an external insurer that only underwrites the risks of:

- its members, subsidiaries and affiliates (captive insurers);
- reinsureds, not being members, subsidiaries and affiliates who acknowledge in writing that they know and accept that the external insurer is a restricted external insurer; and
- such other persons as the Commission may approve; or

(ii) an Unrestricted External Insurer ("UEI") which is an external insurer that is not a restricted external insurer.

Classes of Business

The EIA 2009, provides for the Commission to specify the class or classes of insurance business licensees may engage in. The CIBR 2010 now sets out such classes including:

(i) under the category of "general insurance business":

- accident insurance business;
- liability insurance business which includes

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External Insurance Act, 2009 & Accompanying Regulations Continued

...the VIBR 2010 now prohibits an EIC carrying on external insurance business from engaging in variable insurance business unless the Commission is satisfied with the general character, reputation and experience of the management of the EIC...

directors' and officers' liability insurance, employer's liability insurance, legal expense insurance, libel and slander insurance, personal liability insurance, product liability insurance, public liability insurance; third party liability insurance and title insurance;

- marine, aviation and transport insurance business;
- motor vehicle insurance business;
- pecuniary loss insurance business which includes credit insurance, credit protection insurance, mortgage insurance, surety insurance; and
- property insurance business which includes boiler and/or machinery insurance, contractor's all risk insurance, crop insurance, fire insurance, hurricane and windstorm insurance, livestock insurance, theft insurance, and water damage insurance.

(ii) under the category of "long-term insurance business":

- industrial life insurance business;
- ordinary life insurance business;
- variable life insurance business which includes unit linked insurance and universal life insurance;
- sickness or health insurance business, including group health which includes permanent health insurance;
- pension fund management;
- annuities; and
- variable annuity business.

Notably, the VIBR 2010 now prohibits an EIC carrying on external insurance business from engaging in variable insurance business unless the Commission is satisfied with the general character, reputation and experience of the management of the EIC, and that those persons or firms that are proposed to supply certain services to such EIC reasonably assure competent operation of the variable insurance business.

Financial Obligations

Under the EIA 2009 EICs designated as REIs or UEIs are required to maintain a minimum

paid-up capital or contributed reserve fund, as may be prescribed or approved by the Commission. The CRR 2010 establishes the prescribed amounts for (i) UEIs, (ii) REIs and (iii) EIs as follows:

(i) UEI

- an UEI wishing to be licensed to carry on long-term insurance business must have a fully paid-up capital, capital surplus and subordinated capital or contributed reserve fund of at least \$200,000,
- an UEI wishing to be licensed to carry on general insurance business must have a fully paid-up capital, capital surplus and subordinated capital or contributed reserve fund of at least \$100,000, and
- an UEI wishing to be licensed to carry on both long-term insurance business and general insurance business must have a fully paid-up capital, capital surplus and subordinated capital or contributed reserve fund of at least \$300,000.

(ii) REI

- The CRR 2010 provides that a REI, wishing to be licensed must have a minimum paid-up capital or contributed reserve fund as may be approved by the Commission.

(iii) EII

- The CRR 2010 sets out a formula for calculating the minimum capital and asset requirements for an EII including (a) insurance managers, and (b) external insurance brokers as follows:

Insurance managers - The minimum paid-up share capital and minimum net asset value shall be the greater of the following-

- the maximum deductible amount of the insurance manager's professional indemnity insurance policy; or
- \$10,000.

External insurance broker - An external insurance broker must maintain a minimum paid-up share capital and minimum net asset value which shall be the greater of the following-

- the maximum deductible amount of the external insurance broker's professional indemnity insurance policy; or

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- \$25,000.

Additionally, the CRR 2010 requires every insurance manager and external insurance broker to maintain a professional indemnity with a carrier acceptable to the Commission.

The EIA 2009 and its accompanying regulations update the regulatory framework of offshore insurance business in The Bahamas, meeting international standards while integrating innovative features unique to the jurisdiction.

Colin A. Jupp is a private client attorney and commercial lawyer specializing in Private Client and Wealth Management, Real Estate and Development, Securities, Financial Services Law and Regulation and Commercial Transactions.

Supreme Court Ruling Affirms Legitimacy of The Bahamas' Financial Services Sector

Audley D. Hanna, Jr.

In what could be termed a landmark decision, Justice K. Neville Adderley, in a recent ruling, stated that the G-20 and the Organisation for Economic Cooperation and Development ("OECD") should not be eager to assume wrongdoing on the part of individuals making use of Bahamian offshore financial institutions. Within this case, a claim was brought for fraud both under the common law tort of deceit and pursuant to the Fraudulent Dispositions Act 1991. There were also several alternative claims relating to dishonest assistance in breach of fiduciary duty as well as civil conspiracy.

The events leading up to the trial of this matter were also not without controversy, with an application for the recusal of the Judge with initial conduct of the case going all the way to the Court of Appeal. Ultimately, Justice Adderley was charged with the task of overseeing a trial that lasted in excess of two months, produced approximately 80 bundles of trial documents and five volumes of trial transcripts. Considering the complexity of the case, Justice Adderley was able to provide a meticulous outline of the history of the action as well as a thorough explanation of the factual and legal issues within his 109-page Ruling.

The damages claimed by the Plaintiffs in this case against the various Defendants totalled in excess of US\$260 million relating to alleged fraudulent transactions in excess of US\$150 million. The alleged fraudulent transactions involved multiple jurisdictions including Ecuador, the Netherlands Antilles, the British Virgin Islands and Florida. Despite the numerous

jurisdictions involved, and the fact that most of the witnesses spoke Spanish, The Bahamas was selected as the forum for the hearing due to the fact that the governing law of many of the contracts in question was that of The Bahamas. Additionally, at paragraph 11 of the Ruling, Justice Adderley also suggested that the parties chose The Bahamas as they were of the view that there was a high likelihood of obtaining justice within this jurisdiction.

The principal Defendants in this case were members of a prominent Ecuadorian family who had amassed substantial wealth over time from their involvement in real estate, trade and agriculture. Certain Ecuadorian laws of the 1980s, which precluded Ecuadorian citizens from holding US bank accounts, coupled with the nation's social instability during that era, made depositing wealth offshore an attractive wealth protection mechanism. The family members were also the principal owners of certain financial institutions with financial instruments from one of these institutions being transferred to another family-owned bank. As a part of their strategy, the Plaintiffs attempted to show that the various financial institutions were merely puppets of the family and, as such, there was a basis to pierce the so-called corporate veil so as to make the family members themselves responsible for the alleged fraud. This position was however ultimately abandoned by the Plaintiffs.

The Plaintiffs claimed as follows: (1) that transactions made by the Defendants essentially amounted to the stripping of over US\$150 million in exchange for what turned out to be

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...Ruling Affirms Legitimacy of The Bahamas' Financial Services Sector

worthless instruments referred to as Global Depository Receipts ("GDRs"); (2) that by engaging in these transactions, the Defendants were in breach of their fiduciary duties as trustees as they were acting on both sides of the transactions; and (3) that the Defendants both authorised and approved the various transactions without regard to the interests of depositors.

The facts and legal issues involved within this case are in and of themselves of great complexity and interest; however, what was perhaps most fascinating was the manner in which Justice Adderley discussed The Bahamas' role as a financial sector. At paragraph 49 of his Ruling, Justice Adderley took judicial note of the fact that the financial services sector is the second most important industry within The Bahamas. He further stated that, by the time of the alleged transactions, The Bahamas had gained a reputation as a tax-free jurisdiction and its financial institutions had created numerous products designed for the lawful avoidance of taxes and wealth management. These financial products had become attractive to individuals and institutions in high tax jurisdictions, including Ecuador. Justice Adderley cautioned that the tendency to attach the label of fraud to persons utilising offshore tax-free jurisdictions should be avoided. Justice Adderley went on to declare, at paragraph 51 of the Ruling, that it is a long-standing tradition of English and international law that individuals should be free to utilise offshore jurisdictions to lessen their tax burdens so long as they did not attempt to evade taxation.

Justice Adderley proceeded to opine that the relatively recent establishment by the OECD of the black, grey and white lists, represents a manifestation of the frustration of high tax countries' inability to keep pace with the ever-evolving financial products being offered in

financial centres such as The Bahamas. Justice Adderley appears to suggest that the black, grey and white lists have been developed as mechanisms to indiscriminately target offshore jurisdictions without regard to whether or not the products they offer are lawful or legitimate. In an effort to compel disclosure by offshore jurisdictions, the OECD has mandated that countries sign Tax Information Exchange Agreements ("TIEAs"), failing which sanctions are imposed which Justice Adderley described as "damaging". At paragraph 54 of the Ruling, Justice Adderley stated definitively that the Court cannot accept that merely failing to disclose the details of offshore tax avoidance mechanisms to one's government can in and of itself be an indication of fraud.

In ruling in favour of the Defendants, Justice Adderley held that, based upon the facts of the case, it was apparent that the Defendants honestly believed that the instruments which they traded had value. Justice Adderley concluded that the Defendants' acts were not designed to defraud, but rather, when the various transactions were made, the Defendants honestly and reasonably believed that their strategy had the agreement of the relevant authorities.

Justice Adderley's Ruling contains a firm defence of The Bahamas as a legitimate offshore financial centre. While clearly not condoning unlawful activities or impropriety, Justice Adderley drew a firm distinction between tax avoidance and tax evasion. The former he declared to be entirely legitimate and in fact supported by the prevailing case law of several jurisdictions. While it may be arguable that the distinction between tax avoidance and tax evasion has been eroded in certain jurisdictions, this recent Ruling by Justice Adderley appears to signify that the distinction is still one of importance in The Bahamas.

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Audley D. Hanna, Jr. specialises in various areas of Civil and Commercial Litigation. He is a member of the Bar of the Third Appellate District of the State of New York and is a member of The Bahamas Bar.

Attorneys Named *Leading Lawyers* by Prominent Legal Publications, 2011 Editions



Philip C. Dunkley, Q.C..



Heather L. Thompson



Surinder Deal



Christel Sands-Feaste

Higgs & Johnson is pleased to announce that Philip C. Dunkley, Q.C. – Global & Senior Managing Partner, and Partners Heather L. Thompson and Christel Sands-Feaste have been recommended in the 2011 edition of Chambers Global. Ms. Thompson and Mrs. Sands-Feaste were recommended in General Business Law and Mr. Dunkley in General Business Law: Dispute Resolution. In IFLR1000, Partners Surinder Deal and Christel Sands-Feaste and AssociatesCarolynn Vivian and Benjamin Wrench have been listed as leading lawyers.

Mr. Dunkley, who leads the Higgs & Johnson team, specialises in complex commercial, civil and chancery litigation, appearing leading commercial cases at the Bahamas Bar. He also practices in admiralty and shipping and private wealth management. Ms. Deal has over 20 years of experience in Real Estate, Trust Law and Corporate and Commercial Law. Ms. Thompson has had extensive experience in international trust and company administration; counselling individual and corporate clients on the creation of trusts and ownership structures, and giving advice to trust companies on the development of new services and issues arising in trust administration. Mrs. Sands-Feaste has extensive legal experience in investment funds, corporate and commercial law and international trust and company administration. Earlier this year, she was recommended by Global Law Experts in Mergers & Acquisitions law.

In the Cayman Islands, Carolynn Vivian advises on all aspects of Corporate and Commercial law including public and private mergers and acquisitions, corporate and finance transactions, restructuring and local licensing. Benjamin Wrench has a wealth of experience in financial services law and practice, not least because of his earlier position at a derivatives clearing broker in London but also as a result of specialising in financial services law and unregulated collective investment schemes.

Chambers Global rankings are assessed on criteria that include technical legal ability, professional conduct, client service, commercial awareness/astuteness, diligence, commitment, and other qualities that the client considers relevant. Mr. Dunkley and Ms. Thompson have achieved this ranking consecutively for the past three years.

IFLR1000 is now in its 21st edition and covers over 120 jurisdictions. It is the only publication of its kind to focus on the leading law firms for corporate finance worldwide. Higgs & Johnson has maintained its standing as a Tier 1 firm in The Bahamas for the past four years and is recognised globally as a leading commercial firm.



Carolynn Vivian



Benjamin Wrench

Higgs & Johnson Charitable Contributions in the Cayman Islands



Philip Boni with Tara McField – Program Director of Junior Achievement



Chris Narborough with Pamela Hart – Fundraising Chairman of the Cayman Islands Humane Society

Higgs & Johnson was proud to support Junior Achievement (“JA”) and the Cayman Islands Humane Society in their annual fundraising initiatives.

JA is the world’s largest not-for-profit educational organisation offering in-and after-school practical business programmes. JA has a proven long-term impact on youth, giving them a stake in the free enterprise system to create a better workforce for tomorrow, and is in its nineteenth year in the Cayman Islands.

Pat Randall, President, noted that, “Through our focus on financial literacy, workforce readiness, and entrepreneurship, we can equip future generations with both the knowledge and inspiration to make choices so that they will not repeat the mistakes we are seeing in the world today.”

Cayman Managing Partner, Philip Boni, stated, “Higgs & Johnson understands the paramount importance of supporting a programme such as JA. It is an essential part of the education process as it assists in the development of our students so they can become capable and committed leaders enabling Cayman to confidently move forward in an ever more competitive global environment.”



The Annual Fashion Show & Dinner is a major fundraiser of the Cayman Islands Humane Society which is a non-profit organisation that is reliant on such efforts and public goodwill to continue its service to the community.

Partner Chris Narborough stated, “The Firm recognises the importance of supporting such organisations and hopes that this event will continue to result in more animals being adopted and reducing the overpopulation of strays on the streets.” The Humane Society indicated that this event has become a tradition over the last ten years.

FOCUS on Influential Figures of the Firm



Sir Geoffrey Johnstone
C.M.G., K.C.M.G.

Higgs & Johnson has a decidedly rich history of providing high quality legal services both locally and internationally. Its success has been accentuated by past and present accomplishments of individual attorneys within the Firm who have distinguished themselves among their peers. FOCUS is pleased to provide its readers with insight into the personalities who formed the traditions, established the culture, and who are the current custodians of the ongoing legacy of providing the finest in legal professional services. We trust that you will enjoy reading a record of the informal interviews and direct quotes designed to focus on the life and times, the character and experiences of influential Higgs & Johnson attorneys. Our second featured attorney is Sir Geoffrey Johnstone C.M.G., K.C.M.G., who has had a distinguished career as a lawyer and was the senior partner at Higgs & Johnson for over twenty years.

The Early Years

Sir Geoffrey received his primary and secondary education at Queen's College in The Bahamas. He received his legal education at the Inns of Court School of Law in London and was called to the Bar of England and Wales in June 1950. He was subsequently called to The Bahamas Bar in August 1950. During our FOCUS interview, probing the early years of his exposure to the law Sir Geoffrey reminisced, *'I greatly admired Godfrey Higgs and was very intrigued as a young chap by the De Marigny trial of which he was the defense counsel. After school, I would peek in the window of the Supreme Court and listen to the cases. And this is where, as they say, I got my 'yen for the law'.*" Mr. Godfrey Higgs, (referred to by Sir Geoffrey), was one of the Firm's founding partners and holds a place in Bahamian history for leading the successful defence of Count Alfred de Marigny in the renowned Sir Harry Oakes murder case of 1943.

Sir Geoffrey was invited by Godfrey Higgs & Mervyn Johnson to join the Firm and started on the very same day he was called to the Bahamas Bar. He observed, *'I was the first Associate they hired and eventually they felt comfortable enough to let me manage the Firm while they took vacation. Luckily, we didn't have any*

casualties and the rest its history.'"

Practice of Law

Sir Geoffrey was in active practice from 1950 – 1999. For 21 of those years he was also the Senior Partner of the Firm. Sir Geoffrey, recalling the early years of practice said, *"I didn't find the practice demanding initially. I quite enjoyed it right from the beginning as I really loved the law. I found that I wasn't keen on litigation and as we had a lot of clients that required other legal services I focused on those areas."* During his years as a lawyer there were many developments in the laws of The Bahamas (involving both Acts of Parliament and case law), which were especially significant. Sir Geoffrey noted, *"I had a client who at the time wished to adopt but there was no such legislation in place. So I drafted the Adoption Law for The Bahamas which was subsequently passed. As luck would have it the wife got pregnant and delivered twins right after this."* Sir Geoffrey served as President of the Bahamas Bar Association from June 1973 – 1975 and as a Vice President from June 1975 – 1976.

Founding Fathers

In January 1948 – at a time when other lawyers in The Bahamas were either in solo or father-and-son practices, Higgs & Johnson's founders, the Hon. Godfrey W. Higgs, C.B.E. and friend, Mr. Mervyn Johnson – a former Registrar-General of The Bahamas – established a novel non-family legal partnership. While reflecting on the founding fathers, Sir Geoffrey revealed, *"I got to know Godfrey and we became friends. He was a fighter in the sense that he would not accept any nonsense and welcomed all legal challenges. The De Marigny case was over by then and he had proved himself to be an able lawyer. Mervyn was not as litigious and I think he was better suited doing work for the government side of things as he had been a government servant. He was interested in that more than litigation or private client work."*

The Political Experience

Sir Geoffrey was not only a practicing lawyer but also played a pivotal role in the political life of The Bahamas. He was an elected member of Parliament for the Eastern District of New

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FOCUS on Influential Figures of the Firm cont'd

Providence from 1962 – 1967 and thereafter for the Montagu Constituency in New Providence from 1967 – 1972. Sir Geoffrey recollects, *"I enjoyed politics. I had good fun out of that. I had a political streak inside of me that grew."* He held the positions of Minister of Road Traffic & Records (1964 – 1967) and Chairman of the Hotel Corporation of The Bahamas (1992 – 1994). He also served in Cabinet and was subsequently the Leader of the Opposition in the House of Assembly. When asked further about his political career Sir Geoffrey responded, *"I would do a certain amount in politics and I really enjoyed it. I didn't have the commitment to become deeply involved in politics but when it came time for election I did put on my armour and would get to work. I enjoyed it considerably but I preferred looking after my clients"*.

Knighthood

Sir Geoffrey was appointed a Companion of the Most Distinguished Order of St. Michael and St. George (C.M.G.) by Her Majesty Queen Elizabeth II on 31st December 1994. In the birthday honours of Her Majesty Queen Elizabeth II on 31st December 2002, there was conferred on him the dignity of a Knight Commander of the Most Distinguished Order of St. Michael and St. George (K.C.M.G.). Sir Geoffrey notes, *"Prince Charles actually knighted me as the Queen was away. I enjoyed that so much. It's a pageant of great beauty. Honestly I don't know anything else I've been involved in worldwide as intriguing and as full of glamour and beauty as that service at Buckingham Palace."*

Reflections

When asked what advice he would give the next generation of lawyers Sir Geoffrey responded with the following comment, *"When I reflect on my years, I think that hard work and real effort are the ingredients for making success in the practice of law. It is not easy - the law is a demanding mistress. You need to give a good portion of your life to it and not all lawyers want to do that. I found it very demanding but I enjoyed it nonetheless. I think long hours, hard work and dedication are the key ingredients to being a successful and well respected lawyer. The law is a jealous mistress, it really is."*

Leisure

As Sir Geoffrey remembered his favorite pastime, he reflected, *"I loved skylarking...I had a boat named Skylarking. I had a real affection for The Bahamas, and for the people of The Bahamas. I travelled all over the Family Islands on Skylarking and I enjoyed what each island had to offer."*

Sir Geoffrey who lives on the Island of New Providence is now enjoying his retirement years with his wife Mrs. Anne Johnstone having left a positive and lasting impression on the culture of Higgs & Johnson and the lawyers who were privileged to serve under his leadership.

"When I reflect on my years, I think that hard work and real effort are the ingredients for making success in the practice of law. It is not easy - the law is a demanding mistress."

Newest Associate Welcomed in The Bahamas



Nassau
Lyford Cay
Freeport
Marsh Harbour
Cayman Islands

Web: www.higgsjohnson.com
E-mail: info@higgsjohnson.com



Alexandra Hall specialises in various areas of commercial and company law. She holds both a Bachelor of Arts Degree and Bachelor of Science Degree from St. Francis Xavier University in Antigonish, Nova Scotia, Canada and a Bachelor of Laws Degree and a Master of Laws Degree from the University of London. Alexandra was called to the Bar of England & Wales and is a member of The Honourable Society of Lincoln's Inn. She was admitted to Bar of the Commonwealth of The Bahamas in 2009. Ms. Hall completed her pupillage at Higgs & Johnson and became an Associate in 2010.