



IS CAYMAN STILL OFFSHORE?

Alric Lindsay

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Recently, it has been said that the Cayman Islands are starting to look "onshore". This is due to the countless measures adopted by the Cayman Islands over the years in relation to the exchange of tax information, cooperation between overseas and Cayman regulators and the implementation of various laws and regulations to protect the interests of high tax jurisdictions, some of the latest being US FATCA and UK FATCA. All of this results in the Cayman Islands "mimicking" highly advanced laws of onshore jurisdictions.

Why All the Legislation?

The Cayman Islands incorporated the rules because it is a leading jurisdiction for financial services and, as such, must be seen as the example setter for global financial services compliance. In addition, the Cayman Islands has an unwavering commitment to the sophistication of its legal framework, whether that is at the same level as, or exceeding that of, onshore jurisdictions. Of course, there is also the profound desire to remain "off" any financial blacklist.

Inadvertent Creation Of Tax Authority

A close inspection of the countries that create the blacklists will reveal that they often have in place complex tax regimes designed to raise revenues and further economic development and growth. In other words, the regimes help with stabilization. By passing laws and regulations in the Cayman Islands to implement US FATCA and UK FATCA and by forming the Cayman Islands Tax

Information Authority ("TIA"), the Cayman Islands has inadvertently established a framework which could be used for taxation should the United Kingdom require it to someday institute corporate taxes. Real genius.

One would agree that this is clever on the part of onshore jurisdictions because the mandatory establishment of the TIA (to receive notifications from reporting Cayman Islands financial institutions and to exchange information with the UK and USA authorities) and the installation of a detailed database of entities operating from within the Cayman Islands means that the Cayman Islands is unintentionally preparing itself as a jurisdiction which might have a tax future. It is perfectly feasible in this scenario that, with greater resources, the TIA might one day fulfil the same functions as UK and USA tax authorities.

Regulator To Regulator Queries

Speaking of regulatory authorities, the Cayman Islands Monetary Authority (the "Authority") has a few interesting functions, some which are as follows:

- to regulate and supervise financial services business carried on in or from within the Cayman Islands in accordance with the Monetary Authority Law
- to monitor compliance with the money laundering regulations
- co-operative functions, namely, to provide assistance to overseas regulatory authorities in accordance

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with the Monetary Authority Law

- advisory functions, namely, to advise the Cayman Islands Government on various matters, in particular, with regard to - (i) whether the regulatory functions and the cooperative functions are consistent with functions discharged by an overseas regulatory authority; (ii) whether the regulatory laws are consistent with the laws and regulations of countries and territories outside the Cayman Islands; and (iii) the recommendations of international organizations.

In connection with the discharge of its cooperative functions, the Authority may enter into memoranda of understanding with overseas regulatory authorities for the purpose of assisting cross border supervision with such authorities or for such other regulatory or supervisory purposes as the Authority may deem fit.

Where the Authority is satisfied that a request for assistance from an overseas regulatory authority should be granted, the Authority may disclose information necessary to enable the overseas regulatory authority to exercise regulatory functions, including the conduct of civil and administrative proceedings to enforce laws, regulations and rules administered by the overseas regulatory authority. In some cases, the Authority may permit the overseas regulatory authority to carry out, in relation to an entity in the Cayman Islands that is subject to its supervision or regulation, an on-site inspection or visit in a manner agreed in writing by the Authority and the overseas regulatory authority.

According to the Authority's website, the Cayman regulator has entered into undertakings with over 15 overseas regulators and the Authority is also represented on various bodies. Lastly, the

Authority participates in the International Monetary Fund's (IMF) Information Framework Initiative under which statistical information is provided to the IMF. Sounds like the world's best regulator.

Is the Cayman Islands Doing Enough?

It would seem from the above that the Cayman Islands is making a tremendous effort to ensure transparency and cooperation at various international levels. Its intentions are genuine, helpful and not obstreperous.

However, the jury is still out as the "Grisham Effect" (the tendency for politics, Hollywood movies, books and influential media to wrongly (but successfully) plant negative, sensational suggestions about the Cayman Islands being the go-to destination for ill-gotten gains and as a jurisdiction which embraces a culture of international non-compliance) continues to evolve.

Cayman's Decision To Stay Offshore

The Cayman Islands will remain offshore for a while as more people become educated as to the helpful capital raising and stabilization functions it serves for the global financial markets. In fact, those who are bookish would argue that the Cayman Islands was the most prepared jurisdiction during the 2008 international financial crisis. This is evidenced by the ability of law firms, accounting firms and professionals in the Cayman Islands to calmly and intelligently resolve complex issues facing hedge funds and other entities. One's prediction can now only be that, as a result of its international compliance, professionalism and increasing role in global markets, the Cayman Islands will continue to maintain its position as a respected, offshore global financial centre.

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DRONES & YOU

Property & Privacy Rights

Michael F. L. Allen

Strict application of the principle would mean that any person flying a drone over property belonging to another would be trespassing upon that property and would be liable for damages.

By virtue of Section 5 (b) of the Customs Management (Amendment) Act, 2015, drones may not be brought into The Bahamas. Drones have been classified as restricted import goods. Section 208 of the Customs Management Act, 2011 (the “CMA”) provides that a restricted good may not be allowed in The Bahamas except in accordance with the conditions of the relevant restriction. At present the CMA provides no limitation to the prohibition. Persons attempting to bring a drone into The Bahamas are liable to have their drones forfeited under section 292 of the CMA.

Although The Bahamas has effectively banned the importation of drones, there is no legislation regulating the use of drones presently within its borders. Draft regulations in the form of a proposed Schedule 27 to the Civil Aviation Safety Regulations have been published for comment but not yet passed. At present the ban on drones provides only an incomplete solution to their potential misuse.

Often equipped with surveillance equipment, drones increase the ease with which private land may be traversed and photo / video footage recorded. This has precipitated discussion regarding the potential impairment of the individual’s right to privacy and the enjoyment of property.

A central principle of Bahamian property law is expressed in the legal doctrine “*cuius est solum, eius est use ad coelom et ad inferos*” (i.e. “*whoever’s is the soil, it*

is theirs all the way to heaven and all the way to hell”). The principle provides generally that an owner of property in The Bahamas has rights, not only to the plot of land itself, but also to what is beneath that plot of land, as well as to the airspace above the ground.

Strict application of the principle would mean that any person flying a drone over property belonging to another would be trespassing upon that property and would be liable for damages. In an era where air transport is commonplace, it is accepted that the full application of this doctrine would be absurd. In the 1977 United Kingdom case of *Leigh v Sykviews & General Ltd. [1977] 2 All E.R. 902*, a plaintiff failed to recover damages for trespass in respect of an aircraft flying over his house and taking photographs. The court struck a balance between a landowner’s right to enjoy his property, and the public right to enjoy air travel. It restricted the doctrine so that a landowner’s right to enjoy his property would only extend to such height as is necessary for the ordinary use and enjoyment of his land and any structure on it. The principle was noted by Chief Justice Georges in the Bahamian case of *Roberts v. Albacore Developments Ltd. [1988] BHS J. No. 54*, a case which concerned the creation of rights in condominiums.

The restriction on the right to the complete and exclusive control over the air space above one’s property was confirmed by section 9 of the Civil Aviation Act, which provides that, so long as all related laws

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and regulations are complied with, no action may be brought for trespass or nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which is deemed reasonable in the circumstances.

Currently, notwithstanding section 9 of the Civil Aviation Act and the common law position, it would appear possible to bring an action in The Bahamas for nuisance caused by the noise of a drone disrupting the enjoyment of property. It would also appear possible to bring an action for trespass over land if it could be argued that the flight of a drone over land was unreasonable in the circumstances. What is in fact unreasonable will however be a matter for the courts to decide. Further, under the Civil Aviation Act, material loss or damage caused by an aircraft is recoverable. Any damage to property caused by a crashed drone would conceivably be recoverable if the owner/operator of the drone could be identified.

In The Bahamas, there is no general tort of invasion of privacy at common law. While the Data Protection (Privacy of Personal Information) Act (the "Data Act") governs privacy laws in relation to personal data, there are no "peeping tom" or voyeurism laws, such as exist in other jurisdictions and which seek to protect against surveillance and similar breaches of privacy. We note that the Data Act does regulate the processing, use and disclosure of data once collected. The result is that the combination of statute and common law provisions poses a

challenge to a successful claim for breach of privacy in respect of drone operations.

Drone use is addressed in a proposed new Schedule 27 to the Civil Aviation (Safety) Regulations. If enacted, Schedule 27 will place restrictions on operators of drones (including the requirement for a licence or permit subsequent to taking a skills test). The proposed regulations provide that drone operators must not operate in airspace above property where owners or occupiers have not given prior consent to the flight. The draft regulations would thus severely restrict the right of drone operators to operate their aircraft over private property. The penalties for non-compliance range from a request to suspend flight operations to seizure and destruction of the drone. The practicality of enforcement is however a consideration. Difficulties remain with identifying drone operators and boundaries between properties.

Balancing the protection of rights against the desirability of technological advancement and commercial development continues to be society's challenge. Arguably the government of The Bahamas, recognizing the complexity of the issues involved and the accelerated demand for drone use has acted responsibly in restricting the importation of drones. It must however follow through with regulations designed to secure its national security interests and the well-being of its citizenry.

Michael F. L. Allen is the chair of the Aviation group and his practice involves acting as a transactional lawyer in aviation matters. Other areas of professional expertise include commercial law, corporate law, aviation law, real estate & development, wealth management, and financial services law.



FOREIGN DIVORCE PROCEEDINGS & THEIR EFFECT ON CAYMAN TRUSTS

Jo-Anne Stephens

In considering an application for disclosure pursuant to foreign proceedings, the Courts will consider matters of public policy and the interests of the beneficiaries, particularly the interests of innocent third party beneficiaries.

The treatment of trusts in divorce proceedings has become increasingly important since the landmark decision of the House of Lords in *White v White* [2001] 1 All ER 1.

Since the *White* decision, there has been an emphasis on the 'equality' of the division of assets rather than providing for the reasonable needs of the spouse. Courts in some jurisdictions, such as Hong Kong and England, have broad discretionary powers to impose tailor-made outcomes in divorce proceedings and to divide assets, including those held in trust.

As a result, Cayman trusts have become increasingly embroiled in foreign divorce proceedings, and trustees have been asked to submit to the foreign proceedings or to disclose trust information or to vary the terms of the trust. Before acceding to these requests from the foreign courts, trustees must bear in mind the following.

Firstly, the trustee owes fiduciary obligations to the beneficiaries not to divulge confidential information except in accordance with Cayman law which governs the trust. Trustees are not permitted to disclose confidential information relating to a trust even where ordered to do so by a foreign court unless released in accordance with section 3 of The Confidential Relationships (Preservation) Law ("CRPL"). Confidential information may be disclosed if the Grand Court of Cayman makes such an order or the principal of the confidential information consents to its disclosure. Section 4 of the CRPL provides that whenever a person intends or is required to give evidence on or in connection with any

proceeding by any court, tribunal or other authority, whether within Cayman or otherwise, relating to any confidential information, he shall before doing so apply for directions from the Grand Court. Even where the principal consents, the trustee may be well advised to seek an order of the Cayman Grand Court as it is now settled law that an acquiescence, non-objection or expressed consent, if given under pain of penalty may not be accepted by the Cayman courts as valid consent or authorization [*In Re ABC Ltd* [1984–85] CILR 130 and *Re H* [1996] CILR 237].

In considering an application for disclosure pursuant to foreign proceedings, the Courts will consider matters of public policy and the interests of the beneficiaries, particularly the interests of innocent third party beneficiaries.

Secondly, it would generally not be recommended for a trustee to submit to the jurisdiction of a foreign court in matrimonial proceedings in which one or both spouses were beneficiaries under the trust. This could put the trustee in a situation in which its duty as a trustee to act in the best interests of all beneficiaries is in conflict with an obligation to obey a foreign court order. Furthermore, if it were to submit to the foreign court jurisdiction, a foreign court order relating to the trust would, under the rules of private international law, potentially be enforceable in the Cayman Islands without reconsideration by the Cayman court [*In the Matter of the B Trust RBS Coutts (Cayman) Limited v. W and others* [2010] (2) CILR 348].

Therefore, an order of a foreign court varying the terms of the trust pursuant to divorce proceedings will have no effect until sanctioned by the Cayman courts.

Conversely, if the trustee were not to submit to the foreign jurisdiction, any foreign order made would not be enforceable against it. The trustee would not be bound to follow the guidance of the foreign court, since that court would not have jurisdiction to direct the exercise of the trustee's power. On a subsequent application to the Cayman court, the court would have the discretion to consider the matter and to act in the beneficiaries' best interests.

Finally, the trustee has a duty to carry out the trust according to its terms, unless deviation from those terms was sanctioned by the Cayman court. A trust in the Cayman

Islands can only be varied in accordance with the law of the Cayman Islands and only by a court of the Cayman Islands (Trusts Law (2011 Revision)). Therefore, an order of a foreign court varying the terms of the trust pursuant to divorce proceedings will have no effect until sanctioned by the Cayman courts.

In light of the increase in orders relating to trust property being made in foreign court proceedings, trustees must be mindful of the above principles as they may be in breach of trust and/or the Cayman laws if they comply with foreign court orders or accede to the jurisdiction of foreign courts.

Jo-Anne Stephens is an Associate in the Cayman Islands office and has years of experience in advising financial institutions, investors and professional advisers on the creation of trusts and ownership structures, trust and company administration, the creation and administration of pension plans and contentious trust disputes.

TARA ARCHER PRESENTS AT IBA CONFERENCE

Oscar Johnson, Tara Archer and Audley Hanna with fellow attendee.



Higgs & Johnson Partner, Mrs. Tara. Archer, was a speaker at the 2015 International Bar Association ("IBA") conference in Vienna, Austria. Mrs. Archer spoke in the Dispute Resolution Committee's Session as part of an international panel, which included Justice Gentin of the Tribunal de Commerce de Paris. In presenting her topic, "Too much information? How many cards do you really need on the table to resolve a dispute?" Mrs. Archer shed light on the level of disclosure and exchange of information required in order to advise clients and resolve disputes through negotiation, mediation, arbitration, or litigation.

The IBA conference was also attended by Higgs & Johnson's Managing Partner, Oscar N. Johnson, Jr. and Associate, Audley Hanna. They joined corporate counsel, managing partners, heads of law firm departments and policymakers from all over the world in working sessions and social events.

This year's conference highlighted many important issues including human rights, and featured a number of high profile speakers including Kofi Annan, former United Nations Secretary General. Mr. Annan gave a talk on the "UN Guiding Principles on Business and Human Rights" and the role that lawyers can play in their implementation. He reminded attorneys that, given their unique position, they can influence government, clients and society.

CAYMAN EXPANDS WITH NEW ATTORNEYS



LEFT
*Oscar Johnson,
 Jo-Anne Stephens
 & Phillip Boni*

RIGHT
*Alric Lindsay,
 Senior Associate*



The Cayman Islands office expanded its team of attorneys with the addition of Senior Associate, Alric Lindsay and Associate, Jo-Anne Stephens. Higgs & Johnson's Global Managing Partner, Mr. Oscar N. Johnson Jr. indicated that the firm is very happy to have both attorneys of exceptional calibre join an already strong team.

Alric Lindsay joins the Investment Funds practice group as he advises on all aspects of investment funds, specialising in private equity and hedge fund formation. Alric has extensive experience of corporate and exempted limited partnership structures, establishing and operating fund platforms, advising on fund regulatory matters, restructuring funds and advising funds on other matters arising throughout their life cycle. Prior to qualifying as an attorney, Alric qualified as a certified public accountant with PriceWaterhouseCoopers. Alric also worked as a regulator with the Cayman Islands Monetary Authority.

Jo-Anne was recently admitted to practice as an attorney-at-law in the Cayman Islands by the Honourable Mr. Justice Charles Quin QC. She thanked the Court, Higgs & Johnson, her family and other well-wishers in attendance, indicating that she would uphold "Honour" and Integrity" in all her dealings, in line with her new law firm's motto: "Honor et integritas".

Jo-Anne has particular experience in the areas of Trusts, Commercial Law and Litigation and in addition to her legal qualifications and experience, Jo-Anne, a former Jamaican Independence Scholar and trained mediator, also holds an MBA degree (Distinction) from the University of Oxford, where she maintained a position on the Dean's List.

CARIBBEAN-CANADA EMERGING LEADERS DIALOGUE 2015



Higgs & Johnson Partner, Tara Cooper Burnside, is an alumnus of the Caribbean-Canada Emerging Leaders' Dialogue (CCELD). The CCELD is led by HRH The Princess Royal, Princess Anne, its President and is the Canadian arm of The Duke of Edinburgh's Commonwealth Study Conferences.

A general objective of the CCELD is to help develop in Canada and the Caribbean, a new generation of public and private sectors' leaders, who

are equipped with the skills to resolve complex governance, economic and social issues and advance the values of gender equality, human rights, equity and democracy. The 2015 CCELD theme was "Leading Through Innovation and Transformation" and the Dialogue included a study-tour in Nassau, Bahamas. On the final day of the Bahamas study-tour, Higgs & Johnson was pleased to host the CCELD delegates at its Ocean Centre Chambers for a luncheon presentation by trailblazers in the Bahamian Information and Communications Technologies sector.

Tara Cooper Burnside attended the 2015 CCELD closing ceremony in Kingston, Jamaica and noted, "The feedback regarding the Bahamas study-tour was very positive and the goals and expectations of the CCELD were ultimately achieved. I am very proud that Higgs & Johnson contributed to this wonderful and impactful initiative".

FELLOW OF INSOL INTERNATIONAL



Higgs & Johnson is pleased to announce that Partner, Tara Cooper Burnside, has successfully completed the Global Insolvency Course of the International Association of Restructuring, Insolvency & Bankruptcy Professionals ("INSOL International") and is now officially recognised as a Fellow of INSOL International. The Global Insolvency Practice Course is the pre-eminent advanced educational qualification focusing on international insolvency; an intensive programme that is carried out over three modules with limited admission to the course thereby ensuring academic excellence and the opportunity for good personal contact between students and faculty.

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Director – General
Civil Aviation
Authority of the
Cayman Islands,
Andrea Moultrie
Associate and
Michael Allen,
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In accordance with its commitment to facilitate the ongoing development of its international aviation practice and to support and remain current with advancements in the aviation industry across platforms, Higgs & Johnson participated as a sponsor of the AeroPodium 5th Annual Offshore Aircraft Registration Conference held in Grand Cayman, Cayman Islands.

The event, which was hosted by the Civil Aviation Authority of the Cayman Islands as the Prime Sponsor, brought together professionals representing the most forward thinking jurisdictions in regional aviation.

Michael Allen, head of Higgs & Johnson's Aviation practice group, which straddles the Bahamas and Cayman platforms, noted that successful offshore aviation jurisdictions have a decidedly global perspective on servicing the needs of aircraft owners, operators and also other

jurisdictions. Determined efforts within jurisdictions and a culture of proactive responsiveness to the requirements of the international community have resulted in the stellar success of certain countries, which are able to boast of possessing internationally recognized aircraft registries of choice. Typically such jurisdictions have well-crafted supporting legislation and a responsive judiciary.

The event highlighted the successes of the Cayman, Aruba and Bermuda aircraft registries, the ongoing constructive initiatives within the Bermuda context and the current positive dynamic within the Cayman Islands aviation industry, in anticipation of its implementation of The Cape Town Convention on International Interests in Mobile Equipment and the Protocol thereto on matters specific to aircraft equipment.