



FOCUS

HIGGS & JOHNSON COUNSEL & ATTORNEYS-AT-LAW | VOLUME 61, ISSUE 2/2017

WHAT'S INSIDE

- > Foundation Companies in the Cayman Islands
- > Attorney-Client Privilege: The Road Ahead
- > H&J in the News

Investment Funds as Complements to Trust Structures

By Christel Sands-Feaste



FOCUS EDITORIAL COMMITTEE

Portia Nicholson (Chair)
Jo-Anne Stephens (Deputy Chair)
Michele Bryan
Antonia Burrows
Theo Burrows
Rachel Bush Hughes-Hallett
Antonia Evans
Audley Hanna Jr.
Melanie Hutcheson
Ja'Ann Major
Kamala Richardson
Allyson Speirs

The information contained in this newsletter is provided for the general interest of our readers, and 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. For additional copies of FOCUS, please contact us at info@higgsjohnson.com or at 242 502 5200.

Wealth planning solutions almost invariably include a trust. For many wealth planners and clients, the trust is the gold standard; a tried and tested solution supported by comprehensive, modern legislation and an abundance of jurisprudence.

Having said that, one size does not fit all. The days when matters were straightforward and a will trust or stand-alone trust was sufficient seem to be a distant memory. In today's world, with families domiciled or residing, and holding different types of assets, in multiple jurisdictions, together with the ongoing attempts from the developed world to reduce budget deficits through initiatives such as the Foreign Account Tax Compliance Act ("FATCA") and the Common Reporting Standard ("CRS"), clients are demanding, and practitioners are being forced to develop, more complex and robust asset protection and estate planning solutions.

In recommending alternatives, one of the

key matters to be addressed is the optimal manner of holding and managing the underlying assets. For some, one or more private investment entities may be sufficient. For others, a private investment vehicle may not be sufficient, and an added layer of structure and protection may be necessary. In this very common scenario, a Bahamian investment fund is one option.

Investment Funds

For Bahamian law purposes, an investment fund is a unit trust, company, partnership or investment condominium ("ICON") that issues equity interests, the purpose or effect of which is the pooling of investor funds with the aim of spreading investment risks and achieving profits or gains from the acquisition, holding, management or holding of investments.*

The advantages offered by an investment fund include, facilitating the management of assets of multiple classes within a single regulated structure, accurate ongoing asset valuation, the conferral of differing control and income rights on different family members and the negotiation of fee arrangements based on the pooling of underlying assets. Each of these advantages will be considered in turn.

Regulated investment holding/management vehicle

An investment fund is a regulated vehicle through which the assets of multiple family members (for example, multiple siblings or the settlor and his children) can be pooled and invested. A Bahamian investment fund

which meets the prescribed requirements is licensed by the Securities Commission of the Bahamas (the “SCB”). A professional fund (which is offered to sophisticated/accredited investors only) or a Specific Mandate Alternative Regulatory Test (SMART) Fund is licensed by the SCB or by an investment fund administrator holding an unrestricted license issued by the SCB.

Management of Different Asset Classes

As an alternative to forming separate investment vehicles for different types of assets, an investment fund is an efficient vehicle for managing different classes of assets within the same structure. There are no restrictions on the asset classes or investment objectives for Bahamian funds. The investment objectives and policies can be drafted to suit the particular fund. In most instances, these are very broadly drawn to allow the greatest flexibility. However, any restrictions should be articulated.

In order to control the extent to which family members are entitled to participate in the returns and/or losses from different assets, the constitutive documents for the fund can be drafted to provide for different classes of shares linked to different asset classes. Where there are substantial variances in risk or volatility relating to different assets in the fund, if the fund is structured as a company, it can be registered as a segregated accounts company so that the assets and liabilities linked to each segregated account (or cell) are legally segregated from the assets and liabilities linked to each other segregated account. A practical matter to consider with segregated portfolio entities is that they are more complex to administer, involve increased regulatory costs on a per segregated account basis and some counterparties are not familiar with the concept of a segregated cell entity

resulting in more onerous due diligence requirements.

Retention of Investment Control

Clients who wish to remain actively involved in the management of their assets may continue to manage the assets which have been contributed to the fund through the formation of an investment management or advisory entity to serve as investment manager or investment advisor to the fund, so long as the management entity can demonstrate that it possesses the relevant expertise and experience to satisfy the “fit and proper” requirement for all service providers to an investment fund. It must however, be ensured that the investment manager discharges its functions in accordance with the terms of the investment management/advisory agreement and the investment objectives and policies of the fund. The directors, general partner, trustee or governing administrator of the fund must receive reports from and/or meet with the investment manager from time to time to ensure that they are able to properly discharge their duties to the fund.

Independent Asset Valuation

An investment fund provides a vehicle for the ongoing independent valuation of its underlying assets. The constitutive documents and offering documents of an investment fund generally provide for the calculation of the fund’s net asset value at prescribed intervals selected by the client.

Separation of Control and Economic Rights

Investment funds enable the separation of control and economic rights in respect of the underlying assets in the fund through the creation of different classes of shares. In a straightforward investment fund, there will be two

classes of shares, management shares, with voting rights, which are commonly held by the investment management entity (which is controlled by the settlor or patriarch of the family) and investor shares, with economic rights, which are commonly held by the beneficiaries, children of the settlor, other family members or trustee of a family trust.

A fund is sufficiently flexible so that the rights and restrictions attaching to each class of shares can be tailored to suit the relevant structure so long as these are clearly set out in the memorandum and articles, trust instrument, partnership agreement or regulations and the offering document of the fund.

Techniques that are commonly utilized include, conferring different redemption rights on different classes of shares to control the income received by children, siblings or trustee from the underlying assets or restrictions on the percentage of the overall net asset value or a specified amount that can be redeemed on any particular redemption day.

Efficiencies from pooling

Due to the pool of assets held in the fund, it may be possible to negotiate more favorable rates for professional services such as administrators, based on the total AUM of the fund, than might otherwise be the case if those services were provided in respect of portions of those assets.

In summary, any wealth management and estate planning solution must be tailor made, robust, flexible and workable from a practical perspective. It should be based upon sound professional legal, financial and tax advice. Bahamian investment funds can be a useful component of a comprehensive structure. 🍷

**Section 2, Investment Funds Act, 2003 (the “IFA”)*



Christel Sands-Feaste is a partner in the firm’s Commercial Law Practice and Private Client and Wealth Management Practice Groups and chair of the Securities & Investment Funds Practice Group. She has extensive legal experience in asset financing and regulation and international trust and company administration. She has acted in all aspects of commercial transactions including private placements of offshore securities, investment fund structuring and creation and estate planning. csands-feaste@higgsjohnson.com

Foundation Companies in the Cayman Islands

By Jo-Anne Stephens

Foundation companies are a welcome addition to the complement of legal structures provided in the Cayman Islands. The foundation company may be used for many purposes including the management of property, the conduct of a business, the benefit of a family or to fund philanthropic projects.

The foundation company is a company with a few modifications. Some of the germane features are set out below.

Foundation Company Requirements

For a company to be a foundation company, the requirements are that -

- (a) it is limited by shares or by guarantee, with or without share capital;
- (b) it has a memorandum that -
 - (i) states the company is a foundation company;
 - (ii) generally or specifically describes its objects (which may, but need not, be beneficial to other persons);
 - (iii) provides, directly or by reference to its articles, for the disposal of any surplus assets the company may have on winding up; and
 - (iv) prohibits dividends or other distributions of profits or assets to its members or proposed members as such; and
- (c) it has adopted articles; and
- (d) its secretary is a qualified person. A qualified person is a person who is licensed or permitted by the Companies Management Law (2003 Revision) to provide company management services in the Cayman Islands.

An existing company may apply to the Registrar of Companies (the "Registrar") to become a foundation company and if the Registrar is satisfied that the foundation company requirements will be met, a new certificate of incorporation will be issued containing a declaration that it is a foundation

company.

Management Structure

A foundation company has a very flexible management structure. It may provide for its management by directors (however called) or their delegates, or give rights, powers and duties of any type to its members, directors, officers, supervisors, founders or others. It may appoint a supervisor, who may be required to oversee the directors and exercise any or all of the powers usually vested in members.

Unless otherwise provided, duties under the constitution are owed to the foundation company only. Powers given by the constitution of a foundation company may be given for the benefit of either the foundation company or the donee or for any other purpose and may be subject to any condition.

Members

Unlike a traditional company, a foundation company does not need to have members if its memorandum permits or requires and it has one or more supervisors. If the company originally had members, it may cease to have members, and this will not affect the foundation company's existence capacity or powers.

Bylaws

A foundation company's constitution may provide for the making and altering of bylaws for the foundation company. The bylaws do not form a part of the constitution and are not a public document. Persons dealing in good faith with a foundation company are not required to consider its bylaws or look into compliance by directors or others with its bylaws. The bylaws may guide the exercise of discretions by the directors and supervisors, and would usually have information as to the beneficiaries and their interests in the foundation company.

Registered Office and Secretary

A foundation company's registered office should be at its secretary's business address. A foundation company shall at all times have a qualified person as its secretary. The foundation company shall not accept an asset contribution that is gratuitous or in consideration of a share issue unless its secretary has given the foundation company notice that there appears to be no objection to its acceptance under the Proceeds of Crime law, the Terrorism Law and the Money Laundering Regulations.

Each foundation company shall keep at its registered office a register of its supervisors.

Other Offshore Foundations

The foundation company will serve a similar purpose to the foundation which exists in offshore centers such as St. Kitts, the Bahamas, Jersey, Isle of Man, and Guernsey. However its structure is different. Other offshore centers which have foundations have created a new legal entity reminiscent of the civil law foundation. Cayman chose to modify the well-known company structure with long standing legislation and case law rather than create a new set of rules to govern the new structure, which would presumably take years for the courts to construe and build jurisprudence.

Trusts

The foundation company may be used as an alternative to a trust. The differences between a foundation company and a trust include the following:


- (i) There are no trustees in a foundation company;
- (ii) the foundation company is a legal entity while a trust is not;
- (iii) unless otherwise stated, the directors of a foundation company owe their duties to the company and not to the beneficiaries;

(iv) there is no doubt as to the validity of a foundation company because its registration is conclusive evidence of its validity. The validity of a trust may be challenged on various grounds;

(v) the default rule in foundation companies is that the beneficiaries have no rights;

(vi) there is complete flexibility with

regard to the arrangements for management and supervision.

The foundation company has clear advantages and will provide great flexibility with regard to its purpose, management and supervision. It may be customized to meet the founder's objectives and may assist in achieving the founder's desired tax consequences. 



For more information on this topic, contact: Jo-Anne Stephens, Associate, Cayman Islands
jstephens@higgsjohnson.com


The Bahamas Primary School Student of the Year Award



Higgs & Johnson is pleased to continue its support of the Bahamas Primary School Student of the Year (BPSTOY), in this its 20th anniversary year. BPSTOY was established in 1997 with the aim of recognizing high achievers at the elementary school level. President and CEO, Dr. Ricardo Deveaux noted, "On behalf of the Foundation we are thankful to Higgs & Johnson for their

ongoing support and financial contribution. This support fosters this important partnership that seeks to reward excellence and inspire another generation."

Andria Conliffe, the H&J Scholarship recipient, graduated from Kingsway Academy Primary School and will continue her education in the school's secondary division.

Partner, Surinder Deal noted, "We wish to congratulate Andria on her success at this year's awards and it is our pleasure to provide her with the *Higgs & Johnson Scholarship*. The Partners of the firm also salute the work of the Foundation and offer congratulations to all of this year's honorees." 



Private and Confidential

Attorney-Client Privilege: The Road Ahead

By Vann P. Gaitor

Legal professional privilege, otherwise known as “lawyer-client privilege”, “attorney-client privilege” or “solicitor-client privilege” is a common law doctrine. By virtue of Section 2 of the Declaratory Act, Chap. 4 of the Statute Law of the Bahamas (the “Act”), which came into operation on the 2nd December 1729, the common law of England was declared to be in full force in the Bahamas which was a colony of Great Britain at the time. The Bahamas became an independent country on 10th July, 1973 but the doctrine of attorney-client privilege continues in full force as it did prior to independence.

The Nature of Attorney-Client Privilege

The privilege is the client’s not the attorney’s or legal adviser’s. It may

therefore be waived by the client but not by the attorney. Referring to the privilege, Lord Chancellor Brougham, in *Greenough and others v. Gaskell* *[1824-34] All E.R. Rep. 767 stated at p. 770:-

“The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection; though certainly it may not be very easy to discover why a like privilege has been refused to others, especially to medical advisers. But it is out of regard to the interests of justice which cannot be upholden, and to the administration of justice which cannot go on without the

aid of men skilled in jurisprudence, in the practice of the courts and in those matters affecting rights and obligations which form the subject of all judicial proceedings.

If the privilege did not exist at all, everyone would be thrown on his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person or would only dare to tell his counsellor half his case.”

The Test of Attorney-Client Privilege

The doctrine of attorney-client privilege extends to communications between an attorney and his client and to communications made by the attorney as well as by the client provided the

communication is made for the purpose of giving or receiving legal advice and provided further that the communication was not for the purpose of enabling or committing a crime or fraud. The privilege does not extend to any other profession.

Minter v Priest [1930] A.C. 558 was a case about defamation and slander. However, the import of communications between solicitor and client and whether such communications were privileged or not was thoroughly examined by the court. In his speech, Lord Atkin, addressed the test as to whether such communications were afforded the protection of privilege. Lord Atkin, referring to passages from the judgments of Lindley and Kay L.J., stated at pp. 50, 581 of his speech:-

"The test for such protection has been defined in different words in a number of cases. I think it best expressed in two phrases used in the Court of Appeal in the leading case of *O'Shea v. Wood* (1891) 286, 289. Lindley L.J. adopts the language of Cotton L.J. in *Gardner v. Irvin* (1878) 4 Ex. D. 49, 53: '**professional communications of a confidential character for the purpose of getting legal advice.**' Kay L.J. refers to the language of Kindersley V.C. in *Lawrence v. Campbell* (1859) Drew 485, 90 and adopted by Lord Selborne L.C. in *Minet v. Morgan* (1873) L.R. 8 Ch. 361, 368, communications passing as '**professional communications in a professional capacity.**' The Lord Justice prefers the former phrase, and emphasizes the confidential character. As to this it is necessary to avoid misapprehension lest the protection be too limited. It is I think apparent that if the communication passes for the purpose of getting legal advice it must be deemed confidential.

The protection of course attaches to the communications made by the solicitor as well as by the client. If therefore the phrase is expanded to professional communications passing for the purpose of getting or giving professional advice, and it is understood that the profession is the legal profession, the nature of the protection is I think correctly defined. One exception to this protection is established. If communications which otherwise would be protected pass for the purpose of enabling either party to commit a crime or fraud the protection will be withheld." [My emphasis]

Policy Regarding Attorney-Client Privilege

Legal advice privilege was one of the topics addressed from a policy standpoint in *Three Rivers District Council and Others v Governor and Company of the Bank of England* [2005] 1 A.C. 610 HL. The House of Lords examined the policy reasons underlying legal advice privilege. In considering the policy reasons which led to legal advice privilege becoming established in English law, Lord Scott of Foscote noted in his speech at pp. 646, 647 that:-

first, legal advice privilege arises out of a relationship of confidence between lawyer and client;

second, if a communication qualifies for attorney-client privilege, the privilege is absolute. The privilege cannot be overridden by a supposedly greater public interest. It can be waived by the person or client entitled to it and it can be overridden by statute but it is otherwise absolute except in the case of Canada, where the Supreme Court of Canada has held that attorney-client privilege though of great importance, is not absolute and can be set aside if there

is sufficiently compelling interest for so doing. However, in so far as Lord Scott was aware, no other common law jurisdiction has developed the law of privilege in the way that the law has developed in Canada;

third, legal advice privilege gives the person the right to decline to disclose or allow to be disclosed the confidential communication or document in question;

fourth, legal advice privilege has a relationship with litigation privilege. It is frequently sought or given in connection with current or contemplated litigation but it may be sought or given for purposes that have nothing to do with litigation. A connection with litigation is not a necessary condition for privilege to be attracted to the communication. The case of *Greenough v Gaskell* was cited with approval. It is important to note that Lord Scott emphasized that in England, if a particular communication or document is subject to attorney-client privilege, the privilege cannot be set aside on the ground that some higher public interest requires that to be done.

In the Bahamas, we are not bound by decisions of the House of Lords but such decisions are highly persuasive and the Bahamian courts are not likely to rule differently on the issues of attorney-client privilege that were addressed in *Three Rivers District Council*.

Statutes here in the Bahamas and elsewhere in the Commonwealth of Nations may have made inroads on the doctrine of attorney-client privilege but generally the doctrine remains firmly ensconced in Bahamian law as a matter of public policy. 🇧🇸

*Other references, 1 My. & K. 98; 39 E.R. 618



Mr. Vann P. Gaitor is a member of the Firm's Litigation Practice Group. His practice areas include Commercial Disputes, Real Property Disputes, Banking Law, Employment Law, Personal Injury matters and Matrimonial Law.
vgaitor@higgsjohnson.com

PARTNER ADDRESSES IBA LITIGATION FORUM



Partner and litigator, Tara Archer-Glasgow was a speaker at the roundtable discussion on *Innovation in Litigation* at the annual International Bar Association (“IBA”) Litigation forum of which the firm was also a sponsor. Senior Associate, Audley D. Hanna, Jr. was also in attendance as they joined corporate counsel, managing partners, heads of various law firm departments and policymakers from all over the world through working sessions and social events.

Country Managing Partner Honoured



Country Managing Partner, Cayman Islands, Gina Berry, received special recognition from the Lions Club of Grand Cayman when the organization celebrated

its members past and present with an awards ceremony and a plaque unveiling at the Lions Community Centre.

Senior Partner Ranked by GRR 100



Senior Partner, Philip Dunkley, QC has been included in the Global Restructuring Review’s inaugural GRR 100 survey. It is an annual guide to approved law

firms for cross-border restructuring and insolvency matters.

Elected to Lead



Congratulations to Christel Sands-Feaste, Partner, on being elected to serve as a Director of the Board of the Bahamas Chamber of Commerce

and Employers Federation for the period 2017-2018.

Newest Attorney



Adrian Hunt joins the Litigation practice group where he focuses on Civil and Commercial Litigation, Insolvency Law, Employment Law, and Intellectual property.

HISTORY IN THE MAKING



Partner, Dr. Earl A. Cash, in his role as Chairman of the Board of Trustees of the University of The Bahamas (“UB”) (right) and UB President, Dr. Rodney D. Smith (left) present the university’s first honorary degree, conferred posthumously on former Primer Minister, Sir Lynden O. Pindling. Sir Lynden’s daughter Monique Pindling accepted the honour during UB’s inaugural commencement ceremony.

TRUST ATTORNEYS TRAVEL TO GENEVA



Paul Davis (left), Heather Thompson (center) and Jo-Anne Stephens (right) visited fellow TerraLex member firm LALIVE while in Geneva attending the Transcontinental Trust conference. They are pictured with Sandrine Giroud and Alexander Troller from LALIVE.