FOCUS

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WHAT'S INSIDE

Cybercrime under Bahamian law

By Portia J. Nicholson

Accusations of Russian hacking and WikiLeaks data dumps have once again directed our attention to the pervasive problem of cybercrime. Information technology is an indispensable part of our everyday lives, which, although invaluable, makes us all vulnerable to cyber criminals. From the professional networks used in business, to online shopping, online banking, mobile data services and social media networks, the use of cyber technology is nothing short of ubiquitous. Hand in hand with the growth of digital information has been the exponential increase in cybercrime and the bewildering array of security systems aimed at combatting it. So clearly, the problem is huge. And it will get even bigger.

To date, the only Bahamian legislation that addresses cybercrime directly is the Computer Misuse Act 2003 (the "CMA"). The CMA defines the term "computer" very broadly to include: (i) any electronic, magnetic, optical, electrochemical or other data processing device or series of interconnected devices performing logical, arithmetic, or storage functions; and (ii) any data storage facility or communications facility directly related to, or operating in conjunction with, such device or group of interconnected devices. So arguably a "computer" under the CMA would include devices such as smart phones, tablets, smart TVs, smart watches and perhaps even a microwave oven capable of conducting surveillance, if these exist. >>

The CMA criminalises actions which fall into the following categories:

1. Using a computer to secure unauthorised access to any program or data held in a computer;
2. Using a computer to secure access to any program or data held in any computer with intent to commit an offence involving property, fraud or dishonesty, or which causes bodily harm;
3. Doing any act which you know will cause unauthorised modifications in the contents of any computer;
4. Knowingly (i) securing access without authority to any computer for the purpose of obtaining any computer service, or (ii) intercepting without authority any computer functions using any device, or (iii) using or causing a computer to be used directly or indirectly for the purpose of committing an offence;
5. Knowingly and without authority or lawful excuse interfering with, interrupting or obstructing the lawful use of a computer; or impeding or preventing access to, or impairing the usefulness or effectiveness of, a computer;
6. Knowingly and without authority disclosing any password, access code or other means of access to any program or computer data for wrongful gain or an unlawful purpose or knowing that it would cause wrongful loss to any person; and
7. Obtaining access to any protected computer in the course of commission of an offence.

With respect to item 7 of the offences listed above, a computer is a 'protected computer' if the offender knows, or ought reasonably to know, that the computer or program or data is used directly in connection with, or is necessary for the:

a. security or defence of international relations of The Bahamas;
b. existence or identity of confidential informants relating to criminal law enforcement;
c. provision of services relating to communications infrastructure, banking, and financial services, public utilities, public transportation or key public infrastructures; or
d. protection of public safety including essential emergency services such as police, army and medical service.

Under the CMA, any person who incites, solicits or abets the commission of any offence is also guilty of that offence and liable to the full punishment.

It is clear that the CMA criminalises the most common forms of cybercrime, including *hacking* of the sort complained of by the US Democratic National Committee, the common *phishing* scams aimed at entering your bank account, and *spoofing* emails purporting to be from reputable companies in order to induce you to reveal to the spoofer personal information, such as passwords and credit card numbers. The CMA also covers offences such as cyberstalking, cyberbullying, unlawful online gaming and online prostitution.

The offences under the CMA are not limited to activities which utilise one computer to gain access to another. A person who walks into your office, sits at a computer and begins to access or alter data without authority would be as guilty of an offence under the CMA as someone who emails you malware in order to alter or damage your program or data.

Further, English case law has established, in relation to legislation similar to the CMA, that causing a computer to record data may amount to a modification of the computer. Further, where access to a computer is granted, the use of such access for a purpose which is not authorised will constitute unauthorised access.

The CMA applies extraterritorially and empowers the Bahamian courts to exercise jurisdiction in relation to any offence committed outside of The Bahamas, whether by a Bahamian or a foreigner if either the accused, or the computer, program or data was in The Bahamas at the material time.

It is comforting to know that there is some protection from cyber criminals under Bahamian law. However, as new technologies and new forms of criminality emerge, it may become necessary to update the legislation. Further, the enforcement of the provisions of the CMA will undoubtedly give rise to various issues. For example, the use of law enforcement powers could adversely affect innocent victims and their data protection rights; the fragility and ease of modification /destruction of digital data may lead to difficulties with identification, collection, storage, preservation and adducing of digital evidence; extra-territorial enforcement will test the effectiveness of mechanisms for international cooperation between law enforcement agencies; and inter-jurisdictional differences may stymie law enforcement attempts.

Finally, based on judicial decisions elsewhere, public interest in the disclosure of hacked information may be held to outweigh private property and data protection rights, so that a person who commits an offence under the CMA may nevertheless have the satisfaction of succeeding in his end game if the courts refuse to restrain the disclosure of the illegally obtained data.

Portia J. Nicholson is Partner in the firm's Corporate and Commercial Practice Group with over 25 years of experience in the areas of Corporate and Commercial law. She has acted as counsel in many domestic commercial projects and has served as special counsel in respect of numerous cross-border financing transactions and corporate restructuring projects.

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Amended Cayman CRS Regulations issued

By Alric Lindsay

The Tax Information Authority (International Tax Compliance) (Common Reporting Standard)(Amendment) Regulations, 2016 ("Amended Cayman CRS Regulations") were issued in December 2016 amending The Tax Information Authority (International Tax Compliance) (Common Reporting Standard) Regulations, 2015.

A number of changes appear in the Amended Cayman CRS Regulations, including: new references to a Cayman Financial Institution and Cayman Reporting Financial Institution; the requirement to file a nil return; and the introduction of various penalties and offences.

Cayman Financial Institution

A Cayman Financial Institution is defined in the Amended Cayman CRS Regulations as: (i) a Financial Institution resident in the Cayman Islands other than any of the institution's branches outside the Cayman Islands; and (ii) a branch in the Cayman Islands of a Financial Institution which is not resident in the Cayman Islands. For the purpose of this definition, the term "resident in the Cayman Islands" means incorporated or established in the Cayman Islands or having in the Cayman Islands a place of effective management as defined under the OECD commentary, or being subject to financial supervision in the Cayman Islands.

Notification Obligations of Cayman Financial Institutions

Each Cayman Financial Institution, other than an exempted body (exempted bodies include: the Cayman Islands Monetary Authority ("CIMA"); a Governmental Entity; or a Pension Fund of either CIMA or a Governmental Entity), is required to file with the Cayman Islands Tax Information Authority (the "Cayman TIA"):

a. a notice (an "information notice") containing the required information about the institution on or before 30th April 2017 (or if an entity becomes a Cayman Financial Institution after that date, the next 30th April after the entity became a Cayman Financial Institution); and
b. if any of the required information contained in the information notice changes, a notice stating details of the change (a "change notice").

Such required information includes:

- the institution's name and any number given to it by the Cayman TIA as a Financial Institution
- whether the institution is a Cayman Reporting Financial Institution or a Non-Reporting Financial Institution
- if the institution is a Cayman Reporting Financial Institution, its type or types under the Amended Cayman CRS Regulations
- if the institution is a Non-Reporting Financial Institution, its classification under the Amended Cayman CRS Regulations
- the full name, address, business entity, positon and contact details (including an electronic address) of an individual the institution has authorised to be its principal point of contact and an individual the institution has authorised to give change notices for its principal point of contact.

An information notice or change notice is delivered electronically to an official website. A change notice for a Cayman Financial Institution's principal point of contact can only be given by the individual the institution has authorised for that purpose under its most recent information notice or change notice.

Policies and Procedures to be Adopted by Cayman Reporting Financial Institutions

Under the Amended Cayman CRS Regulations, each Cayman Reporting Financial Institution must implement, maintain and comply with certain written policies and procedures.

Such policies and procedures must identify each jurisdiction in which an Account Holder or a Controlling Person is resident for income tax or corporation tax purposes.

An Account Holder may provide a form of self-certification to the Cayman Reporting Financial Institution to confirm the Account Holder's tax residence. Under the Amended Cayman CRS Regulations, however, a Cayman Reporting Financial Institution should make an effort to corroborate the self-certification and must not ignore warning signs that suggest the self-certification may be incorrect. This is important because, if the institution knows, or has reason to believe, that the self-certification or documentary evidence (the "instrument") is inaccurate in a material way, and it makes a return that relies on the instrument's accuracy, it will be deemed to be contravening its policies and procedures.

Reporting Obligations of Cayman Reporting Financial Institutions

Each Cayman Reporting Financial Institution shall, for each calendar year from and including 2016, make a return to the Cayman TIA for each Reportable Account the institution maintained during the year. If the institution did not maintain any Reportable Account during the year, it must file a nil return. This new nil return filing requirement is a concern for some institutions as it adds to the time to be spent by Cayman Reporting Financial Institutions on each Account Holder and increases administrative and operational expenses.

Each Cayman Financial Reporting Institution must file the above return with the Cayman TIA on or before 31 May of the year following the calendar year to which the return relates. The first return must be filed with the Cayman TIA on or before 31 May 2017.

Penalties & Offences

Where a Cayman Financial Institution provides materially inaccurate information to the Cayman TIA, it may be liable for an offence under the Amended Cayman CRS Regulations. This will be the case where the Cayman Financial Institution knew of the inaccuracy when the information was provided to the Cayman TIA. Directors, partners or >>

trustees of the relevant Cayman Financial Institution may also be deemed to be committing an offence under certain circumstances if the Cayman Financial Institution has committed an offence. Fines for such offences may, in some cases, fall in the region of USD 24,000.

Cayman Financial Institutions must now take greater care in the handling and reporting of information under the Amended Cayman CRS Regulations to avoid potential liability and penalties. In some cases this may mean delegating the performance of required tasks to a third party who can focus on compliance with the institution's mandatory policies and procedures.

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The Bahamas codifies the Rule in Re Hastings-Bass

By Theo Burrows and Kamala Richardson

On 29th December 2016 the Trustee (Amendment) Act, 2016 was passed and, amongst other matters, added section 91C to the Trustee Act, 1998 ("Principal Act"). In effect, this new section preserves a *Re-Hastings-Bass* styled remedy that may be used to undo an exercise of fiduciary power where the exercise of the fiduciary power results in unintended consequences. The inclusion of this new section in the Principal Act was prompted by the UK Supreme Court's decision in the combined cases of *Futter v HMRC*; *Pitt v HMRC [2013] UKSC 26* ("Pitt & Futter").

The Rule in Re Hastings-Bass

The new provisions in section 91C are modeled after the Rule in *Re-Hastings-Bass* ("Rule") which emanates from the UK Court of Appeal's decision in the case of *Re-Hastings-Bass [1975] Ch 25*. In its articulation of the Rule, the court provided that where by the terms of a trust a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorized by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.

The Rule provided trustees with a useful means of unwinding any perceived harsh consequences flowing from exercises of power conferred upon them by the terms of a trust. Once applied, it enabled the court to void the relevant transaction with the effect that it was deemed never to have occurred. Case law illustrates that the Rule has most often been applied to reverse exercises of power made by trustees in light of incorrect tax advice which had resulted in significant and unforeseen tax liability.

The Rule after Pitt & Futter

In Pitt & Futter the Rule, as it had been employed over the past twenty or more years, was severely curtailed. In giving judgment, the UK's Supreme Court held that a precondition to the application of the Rule was that a trustee must be in breach of duty. It was further held that an exercise of power could only be set aside at the instance of the beneficiaries and at the discretion of the court, thereby precluding the trustees themselves from applying to the court to set the exercise aside. In light of the ruling, in common law jurisdictions, such as The Bahamas, where a trustee made a decision that was within the power afforded to him, the court would have no jurisdiction to intervene if the decision was not made in breach of duty. Additionally, intervention by the court would only be made on an application by the beneficiaries.

The Rule preserved in Section 91C

Section 91C preserves the essence of the Rule as it had operated prior to Pitt & Futter, while simultaneously bolstering its effectiveness.

At subsection 91C(2) the court is granted the jurisdiction to set aside an exercise of fiduciary power, not only at the instance of a beneficiary but also at the instance of a trustee, protector, authorized applicant (in the case of a purpose trust), or any other person to whom the court grants permission. It is expressly provided at subsection 91C(4) that an exercise of power may be set aside despite the fact that there is no breach of trust or some other fault on the part of the person exercising the power or advising on its exercise.

Section 91C also clarifies that such exercises may be deemed voidable by the court, and not necessarily void, and that the court may make such further determinations it deems fit, including the effect of the exercise of the power. This provision adds further flexibility, allowing an order made by the court pursuant to section 91C to be tailored to the surrounding circumstances of each case.

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Quick Guide to Cayman Islands Residency: Independent Means and Investment

Introduction

The Cayman Islands are well known for their stability, diversity and ideal climate. It is, therefore, no surprise that these islands attract a number of persons each year who wish to relocate on a more permanent basis.

Some of the innovative options for residency provided to those with independent means and investment capabilities are set out in the Immigration Law (2015 Revision) ("the Law") and its related Regulations under the following categories:

- Residency for Persons of Independent Means
- Certificate of Permanent Investment
- Residency Certificate (Substantial Business Presence Residence (PR) for Persons of Independent Means
- Certificate of Direct Investment

1. Residency for Persons of Independent Means

Under section 34 of the Law, a person who wishes to reside, but not work, in the Cayman Islands and is 18 years of age or older, has no serious criminal conviction, is in good health (with adequate health insurance) and has the financial standing required by the Law, may apply to the Chief Immigration Officer for a "Residency Certificate" which will be valid for a period of 25 years and can be renewed upon expiry.

a The requirements for this category of residency include, where the applicant intends to reside in:

a. ***Grand Cayman***, proof of an annual income of at least CI$120,000 (US$146,341) without the need to be engaged in employment in the Cayman Islands, as well as an investment of CI$500,000 (US$609,756), of which CI$250,000 (US$304,878) must be in developed real estate.

b. ***Cayman Brac or Little Cayman***, proof of an annual income of at least CI$75,000 (US$91,463) without the

need to be engaged in employment in the Cayman Islands, as well as an investment of CI$250,000 (US$304,878), of which CI$125,000 (US$152,439) must be in developed real estate).

Upon the grant, there is a one-time fee payable to the Cayman Islands Government of CI$20,000 (US$24,390) and an additional fee of CI$1,000 (US$1,220) payable for each dependant.

2. Certificate of Permanent Residence for Persons of Independent Means

Under section 34A of the Law, an individual can apply for a Certificate of Permanent Residence for Persons of Independent Means without the right the work where they have invested a minimum of CI$1,600,000 (US$1,951,220) in developed real estate and possess sufficient financial resources to maintain themselves and their dependants. Applicants will also be required to show that they (and their dependants) are in good health and of good character.

Upon the grant, there is a one-time fee payable of CI$100,000 (US$121,951). An additional fee of CI$1,000 (US$1,220) for each dependant is also payable, where relevant.

Unlike the earlier category described at item 1, the right to work in an approved occupation can be gained subsequently, under this category of residency. This is done by way of application to the Caymanian Status and Permanent Residency Board or the Chief Immigration Officer for a variation to the Certificate.

Once varied, the resident is able to work in the Cayman Islands upon payment of an annual fee, being the equivalent of a Work Permit fee for the category of approved employment, for as long as employment is maintained, or until the individual becomes a Caymanian.

The Law does set quotas for the number of persons who may attain residency under this category, which has the additional advantage of having no expiry date.

3. Certificate of Direct Investment

This option, available under section 37A of the Law, is particularly attractive to qualifying entrepreneurial individuals who can invest in an employment generating business in the Cayman Islands and by so doing obtain residency.

Applicants for a Certificate of Direct Investment must be able to demonstrate a personal net worth in excess of CI$6,000,000 (US$7,317,073) and an investment (or an imminent investment) of a minimum of CI$1,000,000 (US$1,219,512) in an employment generating business.

This Certificate, which entitles the holder to reside in the Cayman Islands and to work in the business in which he/she has invested, is valid for 25 years and is renewable.

Upon the issue of the Certificate, there is a one-time fee payable of CI$20,000 (US$24,390) and an additional fee of CI$1,000 (US$1,220) payable for each dependant.

4. Residency Certificate (Substantial Business Presence)

Section 37D of the Law provides a Residency Certificate (Substantial Business Presence) to persons who own at least a 10% share in an approved category of business or will be employed in a senior management capacity within such a business. In either case, the business must have a substantial presence in the Cayman Islands. The type of Residency Certificate, which is not limited to owners of the business, is designed to be less onerous than the option of obtaining a Certificate of Direct Investment.

Persons who have not yet met the requirements, but propose to meet them within a 6 month period, may be granted, at the discretion of the Chief Immigration Officer an "Approval-in-Principle" Certificate, valid for six months and renewable, which allows them to reside in the Cayman Islands and work in the business in which they are an owner or are employed in a senior management capacity.

The applicant and spouse, where applicable, must satisfy the Chief Immigration Officer that they have clean criminal records, are in good health, possess adequate health insurance and fulfil any other requirements set out in the Law.

A fee of CI$5,000 (US$6,098) is payable on the grant of a 25 year Residency Certificate, with an additional fee of CI$1,000 (US$1,220) for each approved dependant. The holder of such a Residency Certificate will also pay an annual fee equivalent to that payable by a work permit holder in the same occupation.

Conclusions

The above highlights are in no way meant to be exhaustive, nor are they intended to constitute legal advice. Rather, the importance of obtaining the assistance of legal counsel in each case cannot be overstated. The experienced team at Higgs & Johnson is able to help you determine the best fit for your particular needs and guide you seamlessly through the process.

For more information on this topic, contact: Gina M Berry, Country Managing Partner, Cayman Islands
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Top Tier Rankings

HIGGS & JOHNSON and its leading lawyers have been recognised in the 2017 editions of *Chambers Global,* IFLR1000 and Who's Who Legal – leading legal directories for the world's foremost business lawyers.

The firm is again ranked in Band 1 in The Bahamas in the General Business Law and Dispute Resolution categories of ***Chambers Global Guide 2017 .***

Calling Higgs & Johnson a "powerhouse firm", Chambers says the partnership is viewed as "a leader in the jurisdiction, particularly renowned for strong offerings in both financial services and real estate work". The team also possesses additional expertise in insolvency, employment and shipping matters, as well as a wealth of other areas. According to Chambers, "market commentators are very impressed with the breadth of the firm's expertise, going so far as to label it 'a one-stop shop,' adding that the firm provides 'everything you would need in a commercial law practice'." Senior partner Philip C. Dunkley, QC, and financial services law & regulation and securities & investment funds practice group chair, Christel Sands-Feaste, are also ranked in Band 1 among individual lawyers in the country. Also featured are widely published trust and estate authorities Dr. Earl Cash and Heather Thompson; and award-winning commercial transactions specialist Surinder Deal. Debuting on the list this year is Oscar N. Johnson, Jr, the firm's managing partner.

H&J also maintains Top Tier status in the ***IFLR1000 Financial and Corporate Guide.***

The 2017 edition recognizes the firm's activity in the energy, telecoms and resort sectors, and recent advice on restructuring, refinancing and regulatory matters. "Leading lawyers" named by the 2017 international guide include partners Surinder Deal, a former chair of the firm's Commercial Practice Group, and Christel Sands-Feaste, chair of the firm's Securities & Investment Funds and Financial Services Practice Groups.

Also recognised by a legal guide this quarter is Tara A. Archer-Glasgow, partner and chair of the firm's Intellectual Property group, named as a leading lawyer for Asset Recovery by ***Who's Who Legal, 2017.***

Awards

The firm has been named a finalist in the Law Firm of the Year category of the Lloyds List Americas Awards 2017. The nomination stems from landmark court actions which contributed to global admiralty law jurisprudence by clarifying the principle of freedom of contract to limit liability in commercial maritime agreements and assisting international lenders to enforce their security globally. H&J counsel included Oscar Johnson and Tara Archer-Glasgow. The awards ceremony will take place in New York in May.

Congratulations to Jo-Anne Stephens, an associate in the firm's Cayman office, and winner of the STEP Student Award, which is presented to the STEP student in the Caribbean and Latin American region with the highest average marks in all exams for the STEP Diploma in International Trust Management during 2016. Jo-Anne will accept the award during the STEP Caribbean Conference in Grand Cayman in May.

Publications

Partner Vann P. Gaitor contributed The Bahamas chapter to *Attorney-Client Privilege in the Americas: Professional Secrecy of Lawyers* (Cambridge 2016). From the publisher: *"One of the major challenges facing the legal profession today is how to adapt and apply the concept of attorney-client privilege (or professional secrecy) in an increasingly globalised world. Rules on attorney-client privilege differ significantly from country to country. This book explores such differences within 32 jurisdictions in North, Central and South America and the Caribbean [and]... the creation of a common definition for attorney-client privilege which can be accepted by a wide variety of countries and international institutions."*