HIGGS & JOHNSON
60
YEARS OF HONOUR & INTEGRITY
1948 - 2008
VOL 52, NO 1/2008

FOCUS

HIGGS & JOHNSON COUNSEL & ATTORNEYS-AT-LAW

H&J Celebrates 60 Years as Counsel to The Bahamas' Financial Services Industry

The world around us has changed a lot in 60 years, but one thing remains constant — the continued adherence to the principles of *Honour and Integrity* upon which the firm was founded

HERE TODAY, HERE TOMORROW: H&J Managing Partner John Delaney (left) and Senior Partner Philip Dunkley (second from left) introduce guests to the family of firm founders The Hon Godfrey Higgs and Mervyn Johnson. Pictured with Messrs. Delaney and Dunkley are Andrew and Chris Higgs (grandsons of Mr. Higgs); Judy Higgs (daughter-in-law); Peter Higgs (former partner, and son); Diane Sturm (daughter of Mervyn Johnson); Joyce and Geoff Higgs (daughter-in-law and son). **Photo by Wellington Chea**

IN THIS ISSUE

On 2 January 1948, just one year shy of his twentieth year in solo practice, and with the triumph of his successful defence of Count Alfred DeMarigny in the dramatic Sir Harry Oakes trial not too distant a memory, pre-eminent Bahamian attorney the Hon. Godfrey Higgs joined forces with longtime friend and former Registrar-General of The Bahamas Mervyn Johnson to form Higgs & Johnson, the country's first non-family law partnership. In 2008 H&J celebrates 60 years as the country's leading law firm.

For the first ten years the pair held chambers on the second floor of the House of Myers on Bay Street and Victoria Avenue with a practice dominated by real property and commercial law. In 1958 the office moved to Sandringham House on Shirley Street. Today the firm's more than 35 lawyers occupy four offices throughout The Bahamas and practise across a wide spectrum of legal specialties and disciplines including litigation, private client & wealth management, real estate & development, commercial transactions, securities, financial services law & regulation, insolvency, company formation and management, shipping and intellectual property.

The Hon. Godfrey Higgs, Founder of H&J

Mr. Mervyn Johnson, former Registrar-General and Co-founder of H&J

In recent years, members of the firm have served as consultants on several important pieces of financial services legislation, including Acts relating to Purpose

continued pg. 10

Good Corporate Governance is Good Business

Lisa R. Benjamin

lbenjamin@higgsjohnson.com

INTRODUCTION

As a result of several corporate scandals over the past 10 – 15 years, good corporate governance has become a major issue for companies and their directors. Recent scandals include the Enron, Worldcom, Robert Maxwell, and more recently the Conrad Black litigation. These scandals have led to a dramatic increase in legislation to try to curb and prevent these types of corporate fraud.

The view of companies "getting away with it" or the "pinstripe plunder" reduces the incentive to comply with the rule of law in all of society.

For example, the Sarbanes-Oxley legislation in the U.S. and more recently the Corruption Bill in the UK. Legislation have been ushered in by the post-9/11 global environment. Global regulations have also been introduced, for example the 2004 OECD Principles of Corporate Governance, the 2005 OECD Guidelines for Multinational Corporations and the 2006 United Nations principles on how institutional investors can invest responsibly.

WHAT IS CORPORATE GOVERNANCE?

Corporate governance consists mainly of principles and systems designed to guide and direct the management of a company. The key foundation to good corporate governance is open and frank disclosure of information, which in turn encourages trust and confidence by the shareholders in the company.

Good corporate governance requires transparency, accountability, respect and fairness at every level of a company. A control system implemented from the top down in a company will often not be effective unless it actively engages at the employee level, and is consistent with the morals and views of the employees. In the U.K. and Europe, the approach of "comply or explain" codes of conduct are not entirely voluntary, but they do leave detailed implementation up to the company. This offers the opportunity for the codes to be catered by the company itself to fit the requirements and business models of the company in question.

WHY COMPLY?

Good corporate governance is good business because it improves the level of legal compliance and ethical conduct by the company. Expanding the risk management function by the Board of Directors to provide for effective Board responsibility for the internal control of the company will increase the reputation and market standing of the company. It also leads to more transparency and richer information flows between shareholders, employees and management, and better information leads to better decision-making.

Good corporate governance includes implementing various levels of self-monitoring, the main one being the use of non-executive directors as a "second pair of eyes". Other aspects of good corporate governance include:

- a high degree of ethical standards required of prospective management during the recruitment process;
- promoting an internal culture of good ethics and compliance;
- deterring and punishing bad behaviour;
- robust internal controls and risk management functions to minimize risky behaviour;
- regular audits of accounts and regular review of auditors;
- the provision of reliable, systematic and well-organized information to the Board;
- "Sunshine is the best disinfectant" – transparency and early detection minimizes the damage;
- encouraging shareholder participation through voting and proxy rights to bridge the gap between ownership and control.

Bad corporate governance, particularly in this jurisdiction, would lead to reputational issues, which would reduce investor confidence and have a severe effect on our financial services industry. It would also have wider ramifications in society as a whole. The view of companies "getting away with it" or the "pinstripe plunder" reduces the incentive to comply with the rule of law in all of society.

DIRECTOR'S DUTIES

Directors are the main governing body of the company, and they have two main duties:

a. the duty to act with care and skill; and

b. fiduciary duties.

These duties are owed by the directors to the company itself, being the shareholders as a whole, but not to individual shareholders.

> As the embodiment of the management of the company, directors have liability where the internal management functions of the company effect the company's financial performance and its relationships with its employees, shareholders and third parties.

Directors also have potentially competing duties to other groups, for example employees, creditors and the environment. Other than the Banks and Trust Regulation Act 2000 and the regulations promulgated thereunder, the Financial Transactions Reporting Act 2000 and the regulations promulgated thereunder, the Investment Funds Act 2003 and the regulations promulgated thereunder, the Securities Industries Act 1999 and the regulations promulgated thereunder, the Central Bank guidelines on corporate governance for licensees, and the BISX listing rules, there are no other guidelines on governance issues for companies other than in the Companies Act 1992 and the International Business Companies Act 2000.

As a result, companies which are subject to fewer formal regulations should institute their own corporate governance policies to instill a culture of compliance, which ultimately limits a director's liability.

The fiduciary duties of a director are:

i. to execute powers for the purpose for which they were conferred, and bona fide for the benefit of the company as a whole; and

ii. not to put themselves in a position in which the director's duties to the company and the exercise of his powers may conflict.

For example, the discretionary right of a director to approve the issue of shares if exercised to ensure the control of that director is invalid.

The duties of care and skill of a director stem from the following three principles being:-

i. a director need not exercise, in the performance of his duties, a greater degree of skill than may reasonably be expected from a person having his particular qualifications and skills (N.B. see recent cases below);

ii. a director is not bound to give all of his time to the office of the company except where he is an executive director or contractually required to work fulltime for the company;

iii. if any duty of a director may be legally delegated, a director is entitled to rely on the person to whom the duties have been delegated, unless there are grounds for suspecting that person may not perform such duties honestly[1].

The first principle has been further expanded by the case of *Norman v Theodore Goddard* [1991] B.C.L.C. 1028 (Ch D), which proposed an objective test of the skill and experience that a director in that position should have, which also takes into account the subjective skills of the director in question.

This new objective test takes into account the fact that the Boards of major companies are "no longer made for gentlemen amateurs exercising general oversight subject to a fiduciary's duty to exercise such care and diligence as an ordinary man would exercise on his own behalf. Increasingly, directors are appointed for very particular skills which they may bring to the board[2]."

In the more recent case of *Standard Chartered Bank v. Pakistan National Shipping Corporation (No. 2)* [2002] UK HL 43, the House of Lords further expanded the first principle above by moving closer to the agency view of directors. Previously courts had considered the "identity approach", which proposed that if a director was identified as the controlling mind of the company, the director should be viewed as the company itself, and therefore exempted from liability as the company is exempted from liability[3].

The approach taken by the House of Lords in the *Standard Chartered Bank* case was that a director should be viewed as an agent of the company, and would therefore have liability as agents would. The agency view is usually applied in relation to functions exercised by the director where he engages with the public on behalf of the company, as opposed to the identity view which is normally adopted where the director is involved in the internal management functions of the company.

However, as the embodiment of the management of the company, directors will still have liability where the internal management functions of the company affect the company's financial performance and its relationships with its employees, shareholders and third parties.

HOW DIRECTORS' DUTIES DIFFER UNDER THE COMPANIES ACT AND THE IBC ACT

Director's Duties

Under section 79 of the Companies Act 1992 ("CA"), subject to any unanimous shareholders agreement, a director must exercise the power of the company directly or indirectly through the employees or agents of the company, and direct the management and business of the company.

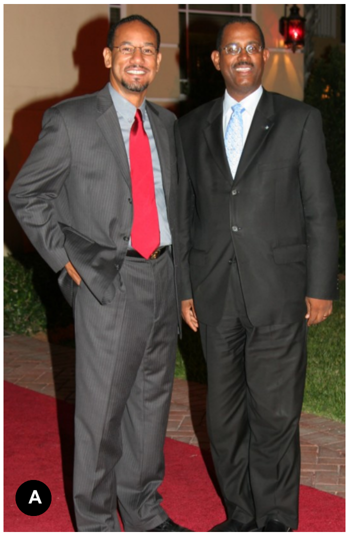
Under section 81 of the CA, every director and officer has a positive duty to act honestly and in good faith, and to exercise the care, duty and skill that a reasonably prudent person would exercise in comparable circumstances.

Despite these positive duties, the burden of proving that a director or officer did not act accordingly lies with the accuser.

Under the International Business Companies Act 2000 ("IBC Act"), section 42 states that subject to the Memorandum and Articles of Association, the business and affairs of the company should

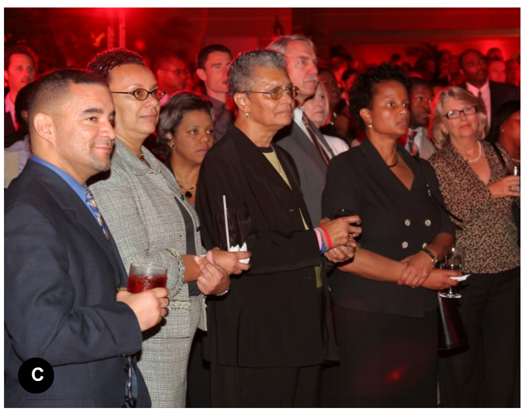
continued pg. 9

60 Years as Counsel to The Bahamas' Financial Services Industry



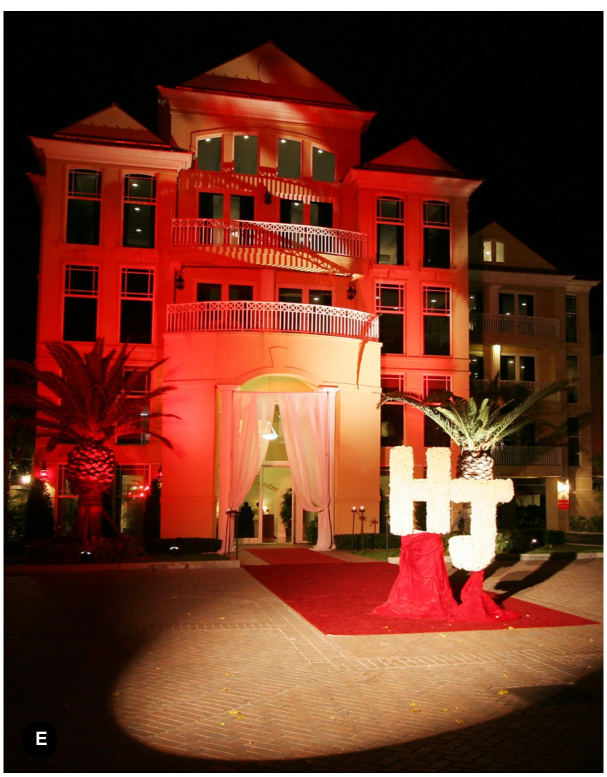
A. (L-R) H&J Managing Partner John Delaney with Minister of National Security The Hon. Tommy Turnquest

B. H&J Partner Tara Archer (far right) with lady members of RBC's Main Branch



C. (L-R) John Benjamin UBS (Bahamas) Ltd.; H&J Partner Heather Thompson; Justice Jeanne Thompson; Maria Ferere, FT Consultants; Virginia Damianos-Premock, Sotherby's Damianos Realty Limited

D. H&J former Senior Partner Sir Geoffrey Johnstone (center) , Mrs. Johnstone (immediate left) and family

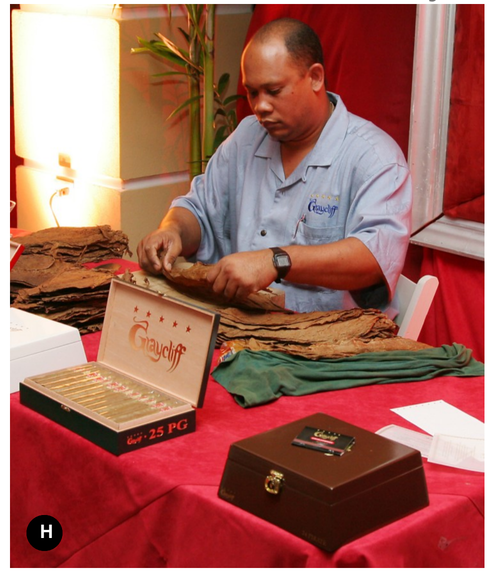


E. Ocean Centre, H&J's Nassau Office

F. H&J Senior Partner Philip Dunkley

60 Years as Counsel to The Bahamas' Financial Services Industry

In 2008 we commemorate both the great start by our founders and the wisdom of those that followed in continuing the worthy ideals upon which H&J was founded.



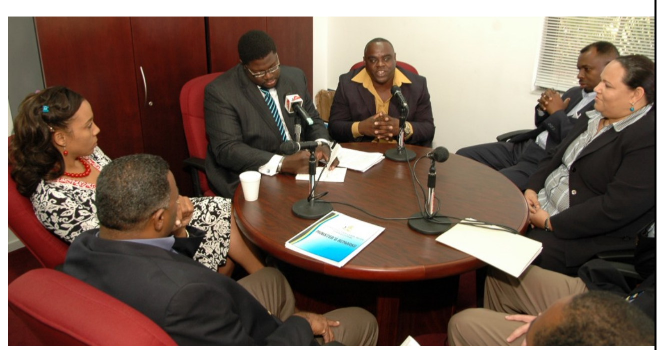
G. H&J Partner Dr. Earl Cash; Lucethy Smith, UBS (Bahamas) Ltd.; H&J Partner Heather Thompson; Pricilla Hudson Carey; Coldwell Banker/Lightbourne Realty

H. Graycliff cigar roller

I. (L-R) Daphne Delaney. TradeInvest Asset Management.; Vaughn Delaney and Paul McWeeney, Bank of the Bahamas; Wendy Warren, BFSB

J. (L-R) Anthony Kikivarakis, JP Morgan; Terry Marr and Anthony Musgrove, Cititrust (Bahamas) Ltd.

H&J Contributes to Chevron Road Safety Youth Programme



Left, H&J Partner, Tara A. A. Archer presents a cash donation to President of Chevron (Bahamas) Ltd., Armando Vegas.

Right, Ms. Archer participates in a radio panel addressing the importance of road safety among youth and other road users.

Case Report re Disclosure and Letters of Wishes

Introduction

A Letter of Wishes is a document which sets out the settlor's expectations of the trustee. It also serves as a guide for the trustee in the exercise of its functions and duties as conferred by the trust instrument.

The case under discussion here is that of:

Manuela Breakspear and others v Robert Charles Ackland and Patricia Ann Dunning [2008] EWHC 220 (Ch); [2008] WLR (D) 52

The case was heard before Briggs J on 19 February 2008.

...It is in the interests of beneficiaries of family discretionary trusts, and advantageous to the due administration of such trusts, that the exercise by trustees of their dispositive discretionary powers be regarded, from start to finish, as an essentially confidential process.

Analysis

There were three heads of relief sought by the claimants against the defendant trustees:

"(1) Disclosure of a wish letter written to the then trustees by Basil James Dunning ("Basil") who, by common consent, was the *de facto* settlor of the Settlement.

(2) The setting aside of a purported addition of the second defendant ("Patricia") as a beneficiary of the Settlement by deed dated 9th March 1995; and

(3) Disclosure by the trustees of any appointments made or purported to be made pursuant to paragraph 7 of the Settlement."

It is only the first head of relief which is covered in this report as the last head fell away and the claim for relief under the second head is not materially relevant to the disclosure issue.

Disclosure

Briggs J, sitting in the Chancery Division, held that generally the confidence which ordinarily attached to a wish letter was such that, for the better discharge of their confidential functions, the trustees need not disclose it to beneficiaries merely because they requested it unless, in their view, disclosure was in the interests of the sound administration of the trust, and the discharge of their powers and discretions.

In dealing with this issue, Briggs J turned to the question whether, and, if so, in what way, the "Londonderry principle" applied to wish letters. The principle emanates from the seminal case of ***In re Londonderry's Settlement [1965] Ch 918*** in which it was held that the process of the exercise of discretionary dispositive powers by trustees was inherently confidential, and that that confidentiality existed for the benefit of the beneficiaries rather than merely for the protection of the trustees. It is important to note, however, that, in so doing, Briggs J addressed himself solely to the issue of wish letters arising in the context of family discretionary trusts. In considering the "Londonderry principle", Briggs J said this:

"At the heart of the Londonderry principle is the unanimous conclusion (most clearly expressed by Danckwerts LJ) that it is in the interests of beneficiaries of family discretionary trusts, and advantageous to the due administration of such trusts, that the exercise by trustees of their dispositive discretionary powers be regarded, from start to finish, as an essentially confidential process. It is in the interests of the beneficiaries because it enables the trustees to make discreet but thorough inquiries as to their competing claims for consideration for benefit without fear or risk that those inquiries will come to the beneficiaries' knowledge. They may include, for example, inquiries as to the existence of some life-threatening illness of which it is appropriate that the beneficiary in question be kept ignorant. Such confidentiality serves the due administration of family trusts both because it tends to reduce the scope for litigation about the rationality of the exercise by trustees of their discretions, and because it is likely to encourage suitable trustees to accept office, undeterred by a perception that their discretionary deliberations will be subjected to scrutiny by disappointed or hostile beneficiaries, and to potentially expensive litigation in the courts.

The question is whether the Londonderry principle remains good law, at least in England. In my opinion, it is still good law and, in any event, law by which a first instance judge remains bound, unless and until released by some higher judicial or parliamentary authority."

In the instant case, a wish letter was brought into existence for the sole purpose of serving and facilitating an inherently confidential process. In the learned judge's opinion, it was, therefore, axiomatic that a document whose sole or predominant purpose of being was to be used in furtherance of an inherently confidential process must itself properly to be regarded as confidential, to substantially the same extent and effect as the process which it was intended to serve. On this point, Briggs J made these observations:

> "I turn therefore to the question whether, and if so in what way, the Londonderry principle applies to wish letters. In that context I am content to limit myself to wish letters arising in the context of family discretionary trusts ... The defining characteristic of a wish letter is that it contains material which the

settlor desires that the trustees should take into account when exercising their (usually dispositive) discretionary powers. It is therefore brought into existence for the sole purpose of serving and facilitating an inherently confidential process. It seems to me axiomatic that a document brought into existence for the sole or predominant purpose of being used in furtherance of an inherently confidential process is itself properly to be regarded as confidential, to substantially the same extent and effect as the process which it is intended to serve.

"While in a sense a wish letter is the companion of the trust deed, it by no means follows that it therefore needs or ought to be afforded similar treatment in the hands of the trustees. The trust deed is a document which confers and identifies the trustees' powers. There is in principle nothing confidential about the existence and precise boundaries of those powers. By contrast, the wish letter, operating exclusively within those boundaries and purely in furtherance of the trustees' confidential exercise of discretionary powers, may properly be afforded a status of confidentiality which the trust deed itself entirely lacks."

Briggs J went further to say:

"The essential characteristic of a wish letter … is that it is a mechanism for the communication by a settlor to trustees of the settlement of non-binding requests by him to take stated matters into account when exercising their discretionary powers. Typically, wish letters are concerned with the exercise of dispositive discretions, but they may include wishes in relation to the exercise of powers of investment, or of other purely administrative powers."

…While in a sense a wish letter is the companion of the trust deed, it by no means follows that it therefore needs or ought to be afforded similar treatment in the hands of the trustees.

The learned judge felt that there was nothing unusual in such an approach. It was, he said, "… routinely applied in the working out of the principles of legal professional privilege, litigation privilege, and public interest immunity, as well as in the application of the without prejudice principle."

Indeed, as Briggs J pointed out:

"Plainly, if the law is that, generally, wish letters are not disclosable, settlors will be encouraged to use them as the medium for the communication of valuable but confidential information relevant to the exercise of the trustees' discretionary powers. If by contrast wish letters are generally disclosable, that potential advantage is likely to be wholly closed off for the future, and the disclosure of genuinely confidential information in existing wish letters at the request of beneficiaries is likely to risk causing precisely the harm which led to that information being included in a wish letter in the first place, and to defeat what may to date have been real expectations of confidentiality in the minds both of settlors and trustees."

His Lordship noted, with regard to these two approaches to the issue of disclosure, that:

"The critical difference … was that confidence might be overridden by the exercise of the court's discretion, whereas privilege might not … Generally, the confidence which ordinarily attached to a wish letter was such that, for the better discharge of their confidential functions, the trustees need not disclose it to beneficiaries merely because they requested it unless, in their view, disclosure was in the interests of the sound administration of the trust, and the discharge of their powers and discretions."

In a comprehensive and scholarly analysis of the relevant case law, Briggs J addressed this particular point and he observed:

"There is therefore an inevitable tension between on the one hand the advantages of confidentiality, and on the other hand the advantages of disclosure, in relation to wish letters. It is precisely this tension which has generated the controversy evident in the Australian, New Zealand and Channel Islands authorities.

Overhanging the whole of this analysis is the question whether, as one Australian judge has suggested, the traditional English recognition of the need to preserve the confidentiality of trustees' decision making has been overtaken by changes in social attitudes, in which notions of openness and accountability are said to have gained prominence at the expense of privacy and confidentiality, in connection with dealings by persons with power to affect the lives, property and legal rights of others."

In his judgment, Briggs J noted that in the 17th edition of Underhill and Hayton's Law Relating to Trusts and Trustees, the learned authors assert that:

> *"Since disclosure of information to beneficiaries is now based on the core accountability of trustees to them, this [wish] letter is a key document that needs to be available for inspection by beneficiaries if they are going to be in a position where it becomes possible for them to bring the trustees properly to* account".

Responding to this assertion, Briggs J said:

> "With respect, that analysis appears to assume that, because trustees are accountable to their beneficiaries, the beneficiaries have a right to investigate the rationality or correctness of the trustees' discretionary decision-making rather than its honesty or fairness. English authority has, between 1851 and 1994, consistently denied them this right, save where the trustees choose to reveal their reasons."

In the absence of special terms, the confidentiality in which a wish letter was enfolded was something given to the trustees for them to use, on a fiduciary basis, in accordance with their best judgment and as to the interests of the beneficiaries and the sound administration of the trust. Once the settlor had completely constituted the trust, and sent his wish letter, the preservation, judicious relaxation or abandonment of that confidence was a matter for the trustees or, in an appropriate case, for the court. Referring to the landmark Privy Council case of <u>Schmidt v. Rosewood Trust Ltd.</u> ([2003] 2 AC 709), Briggs J noted the following conclusions of Lord Walker:

> "However, the recent cases also confirm ... that no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests to different beneficiaries, trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place."

Continuing Briggs J said:

> "Apart from the conclusion that the grant or withholding of disclosure sought by a beneficiary is essentially a discretionary matter for the court, (rather than a matter of right depending upon "bright dividing lines" or rigid categories of excluded documents), Lord Walker expressed no hint of disapproval at the manner in which the Court of Appeal explained in <u>Re Londonderry</u> the principled basis for refusing inspection on grounds of confidentiality. On the contrary, he described the need to protect confidentiality as "one of the most important limitations on the right to disclosure of trust documents" (in paragraph 49) and commended <u>Re Londonderry</u> as an important case in the development of the principles regulating the exercise of discretion, in the passage in paragraph 54 which I have quoted above."

His Lordship's conclusion that, in general, wish letters fell within the Londonderry principle made it unnecessary to decide whether wish letters fell into any of the Londonderry excluded categories. In so concluding, His Lordship made these points:

> "Trustees are fiduciaries exclusively for their beneficiaries and should not in my opinion be asked to accept, nor should they without good cause accept, restraints upon their use of relevant information which would prevent disclosure even where, in their view, disclosure was preferable to the continued maintenance of confidence ... My conclusion that, in general, wish letters fall within the Londonderry principle makes it unnecessary for me to decide whether wish letters fall into any of the Londonderry excluded categories ... trustees should in general regard a wish letter (that is a document from the settlor the sole or predominant purpose of which is or appears to be to assist them in the exercise of their discretionary powers) as invested with a confidentiality designed to be maintained, relaxed, or if necessary abandoned, as they judge best serves the interests of the beneficiaries and the due administration of the trust. This discretion to maintain, relax or abandon confidence arises regardless of a request for disclosure by a beneficiary, and persists regardless of the incapacity, death or change of heart on the part of the settlor."

Nevertheless, Briggs J applied this proviso:

> "If, however, a genuine issue as to the construction of a trust deed becomes the subject of litigation, and that issue appears likely to be illuminated by relevant background material evidenced by a wish letter, then the wish letter may become disclosable, regardless of its confidentiality, in accordance with ordinary principles of disclosure in civil litigation."

How, then, does this case relate to the position which exists in The Bahamas? The simple answer is that it reinforces the view taken by the framers of the current trust legislation in this country. Section 83(8)(a) of the Trustee Act 1998 provides:

> "...trustees shall not be bound or compelled by any process of discovery or inspection or under any equitable rule or principle to disclose or produce to any beneficiary or other person any of the following documents, that is to say-
>
> a. any memorandum or letter of wishes issued by the settlor or any other person to the trustees, or any other document recording any wishes of the settlor;"

A letter of wishes is prepared when there is a discretionary trust and the beneficiaries have no vested interest. Under section 83(8)(a) of the Act, a Bahamian court cannot ordinarily compel a trustee to disclose or produce a letter of wishes, because it is not considered to be a trust document. Therefore, beneficiaries are not entitled to inspect the letter of wishes. The application of the section is limited to both beneficiaries and representatives of beneficiaries.

A final point to note is that Section 83(8)(a) also serves to protect the confidentiality of the settlor. The letter of wishes is written by the settlor directly to the trustee for the purpose of assisting the trustee in its decision-making that affects the beneficiaries. Such confidentiality, as was noted by Briggs J in **Breakspear v Ackland**, is necessary to avoid potential conflicts between the beneficiaries in respect of their interest in the trust property.

Good Corporate Governance is Good Business cont'd

be managed by at least one director. Section 55 imposes a positive duty on the director, officer and agents to act in good faith as well. However, this positive duty is expressly tempered by section 56 of the IBC Act, which states that a director, officer or agent is entitled to rely on accounts, records and reports made to the company by any other party to which such duties have been delegated by the company. This reduces a directors' obligation and, therefore, liability to look behind and verify any of the reports, records or accounts presented to him.

Director's Liability

Section 97 of the CA provides for delegation of company management to managing directors or a committee of directors, but this does not detract from the liability of the delegating directors. Section 98 of the CA expressly restricts the authority and power of any managing director or committee of directors.

Section 101 of the CA makes directors expressly liable for authorising the issue of shares for consideration other than money when the consideration received is less that the fair value in money the company would have received if the shares had been issued for money.

Section 102 of the CA specifically makes directors jointly and severely liable if they consent to:

- a prohibited loan;
- a purchase or other acquisition contrary to section 44(2);
- a commission contrary to section 47; or
- a payment of a dividend contrary to sections 61 and 63.

The only defence to this express liability is under section 105, if the director does not know and could not reasonably have know that the share was issued for consideration for less that the fair equivalent of the money that the company would have received. There is also a time limit of two years, after which a claim cannot be made under sections 101 and 102. There is no similar express liability imposed on a director under the IBC Act.

Financial Statements

The CA imposes strict obligations on the directors of private companies in relation to financial statements. In particular, at every AGM financial statements and auditors reports must be produced (see sections 118-121). In fact the Companies Registrar itself may request copies of the annual statements of a company, which potentially provides for independent oversight of the company's financial condition (see section 128). Section 136 imposes direct obligations on directors and officers to advise the auditor of any errors or mistakes a director or officer becomes aware of in any of the statements.

Section 138 further states that where any express provision in favour of any officer of the company or any auditor which indemnifies him from liability when the rule of law would otherwise attribute liability to that person for negligence, default or breach of duty, such provision will be void. This does not apply to private companies as defined in the CA.

The IBC Act does not have any similar stringent requirements in respect of financial statements. The IBC Act simply states that the company will keep such financial statements of account and records as the director considers necessary to reflect the financial position of the company.

Corporate Benefit

Sections 30 and 31 of the CA impose strict restrictions on the ability of the company to provide

continued pg. 10

END NOTES

[1] Re City Equitable Fire Insurance Co. Ltd. [1925] Ch. 407 (CA).

[2] "Company directors – collective or functional responsibility" by Rupert Reed, Company Lawyer 2006 27(6) pg. 170-178

[3] "Directors' tortious liability – Standard Chartered Bank and the restoration of sanity" Journal of Business Law 2004 September, 539-548

60 Years as Counsel to The Bahamas' Financial Services Industry

Trusts, Foundations and Private Trust Companies and were involved in advising the government from a private sector perspective on the restructuring of industry legislation in response to initiatives of the Financial Stability Forum, Financial Action Task Force and OECD.

"The firm's expansion over the latter half of the twentieth-century and its continued success now into the twenty-first have truly paralleled the growth of The Bahamas," said Managing Partner John K. F. Delaney. "Godfrey Higgs' reputation as an attorney even before the firm's inception allowed him to attract the highest calibre of clients. Real estate, banking and private wealth management – all key factors in the economic evolution of The Bahamas – have also been the areas where we have applied our energy to promote the development of the financial services sector and the legal profession."

Much of the firm's success over the past 60 years also derives from the high standards and unwavering principles of its longest serving Senior Partner, Sir Geoffrey A. D. Johnstone, KCMG who headed the firm following Mr. Higgs' retirement in 1968 until he himself retired from active partnership in 1998. Mr. Higgs' departure precipitated the admission of several new partners the following year, including Sir Leonard Knowles who in 1973 would become the first Chief Justice in an independent Bahamas.

In 1973 H&J welcomed William McPherson Christie as a partner and incorporated his former practice. In 1999 commercial litigator Philip C. Dunkley succeeded Sir Geoffrey as Senior Partner with managing partner responsibility and presided over the reopening of the firm's first satellite office at Freeport, Grand Bahama. In 2001 H&J opened its third office at Lyford Cay, at the western end of New Providence. In 2006, after 47 years at Sandringham House, the firm moved its flagship office to Ocean Centre, a state-of-the art business facility at Montagu Foreshore on East Bay Street. In 2007 John K. F. Delaney succeeded Mr. Dunkley as Managing Partner, and that year marked the opening of the firm's fourth office at Marsh Harbour, Abaco.

H&J has a long history of charitable initiatives in the communities in which it operates. With a thrust on education, H&J is the only private sector partner in the Ministry of Education's Teacher of the Year programme. The firm provides a significant cash prize that rewards educators who exemplify excellence in education and leadership development.

H&J is currently ranked as a Tier 1 law firm by independent global legal directories *Chambers and Partners Global Guide* and *IFLR 1000.* In 2008, for the second consecutive year Higgs & Johnson was ranked first in "inheritance and succession planning – Caribbean" by Euromoney magazine's Private Banking Survey. Other accolades included the highest Bahamian law firm ranked for "Tax Guidance and Services – Caribbean" and the only Bahamian law firm ranked for "Corporate Advisory for Private Banking Clients – Caribbean."

"This anniversary presents an opportunity to celebrate our longevity, but also provides an occasion to pay homage to the time-honoured principles that will drive us in the future," said Mr. Delaney. "H&J has held to its ideals and reputation despite dramatic changes in our culture and financial system over the last 60 years. We will no doubt continue to hold in high regard our commitment to maintaining close working relationships with our clients and to delivering quality legal services."

Good Corporate Governance is Good Business cont'd

financial assistance to certain parties. This effectively restricts the directors from providing financial assistance in certain circumstances, without receiving a demonstrable corporate benefit in return. An IBC is specifically authorized, under section 10 of the IBC Act, to perform all acts and activities irrespective of corporate benefit, where they are conducive or necessary to the conduct, promotion or attainment of the objects or purposes of the company.

CONCLUSION

The above points exemplify that directors have less compliance obligations under the IBC Act than under the CA. The directors of an IBC, therefore, have fewer formal structures to comply with, and as a result have more freedom of control over internal management and the business affairs of an IBC than directors of a CA company. As a result, and because of the reasons set out above, in order to avoid or mitigate liability, directors of IBCs should be encouraged to implement formal corporate governance mechanisms in their companies as set out above. These include, briefly, effective monitoring by the board of directors, performance-based recruitment and remuneration, regular supply of governance information, regular audits and independent relationships with auditors, and increased participation by shareholders.

Nassau
Lyford Cay
Freeport
Marsh Harbour

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

Florida Proposed Repeal of Sales Tax Exemption to Affect Caribbean Region

In late 2007 the Taxation and Budget Reform Commission of the State of Florida (the "Reform Commission") entertained a resolution that would cause the "repeal of exemptions and exclusions from state sales tax to replace the ad valorem tax millage set by the legislature under the Florida Education Finance Program." Simply put, this means that revenue that would have been raised by the taxation of all Florida school property would cease and such revenue would come instead from the savings to the Florida Treasury by the repeal of the sales tax exemption provided to businesses and persons who export goods from Florida.

The rationale for the proposed repeal is that it would advance or serve a public purpose. In fact, if it is found otherwise, the Florida's Legislature would not likely pass such a law. On the surface it would appear that such repeal would meet such public purpose in at least supporting educational initiatives or institutions and at most creating a level playing field between consumers in Florida who must pay the sales tax and those outside of Florida who presently do not.

The impact on Caribbean and Central and South American Countries would be dramatic and certainly would be felt more directly and immediately by small countries like The Bahamas which rely so heavily on exports from Florida. It must also be remembered that individual Bahamians tend to treat South Florida as a suburb of The Bahamas. Every Bahamian shopper in Florida will feel the effects of the repeal. Moreover, the inflationary fall out would be another dagger in the heart of an already sagging Bahamian economy that is reeling from the recessionary winds blowing from the United States. The President of The Bahamas Chamber of Commerce estimates that if Bahamian importers, wholesalers and retailers had to pay a 6% sales tax (or possibly 7%, if the sales tax increases) the cost for such imported goods would increase easily by 10%.

Before the Democratic-sponsored resolution can become law, it will likely be put before the Florida public in a referendum during the national general election in November, 2008. Thereafter, it would have to be approved by 3/5 votes of the membership of each House of the Legislature. There might not be much that the affected countries can do between now and November, 2008, since one cannot lobby the Reform Commission, but thereafter such countries should aim to impress the Florida Legislature with the downside to such repeal. In other words, those countries should provide the Legislature with the flip side of the coin: that Florida stands to lose more when businesses especially go to other tax-friendly states for their goods. If that loss outweighs the anticipated savings, then the repeal would not serve or advance the public purpose contemplated by the Legislature.

At this point, the repeal would not apply to food and prescription drugs. When the dust settles, the question will be what all does "food" entail. In any event, this is introduction to the story, and FOCUS will provide its readers with ongoing developments.